

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR PETITIONERS

507

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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for the District of Columbia Circuit

No. 22,024

FILED AUG 6 1968

METROPOLITAN TELEVISION COMPANY *Nathan J. Paulson*
SANGRE de CRISTO BROADCASTING CORPORATION, ^{CLERK}

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents,

NATIONAL ASSOCIATION OF BROADCASTERS,
ALL CHANNEL TELEVISION SOCIETY, et al.,

Intervenors.

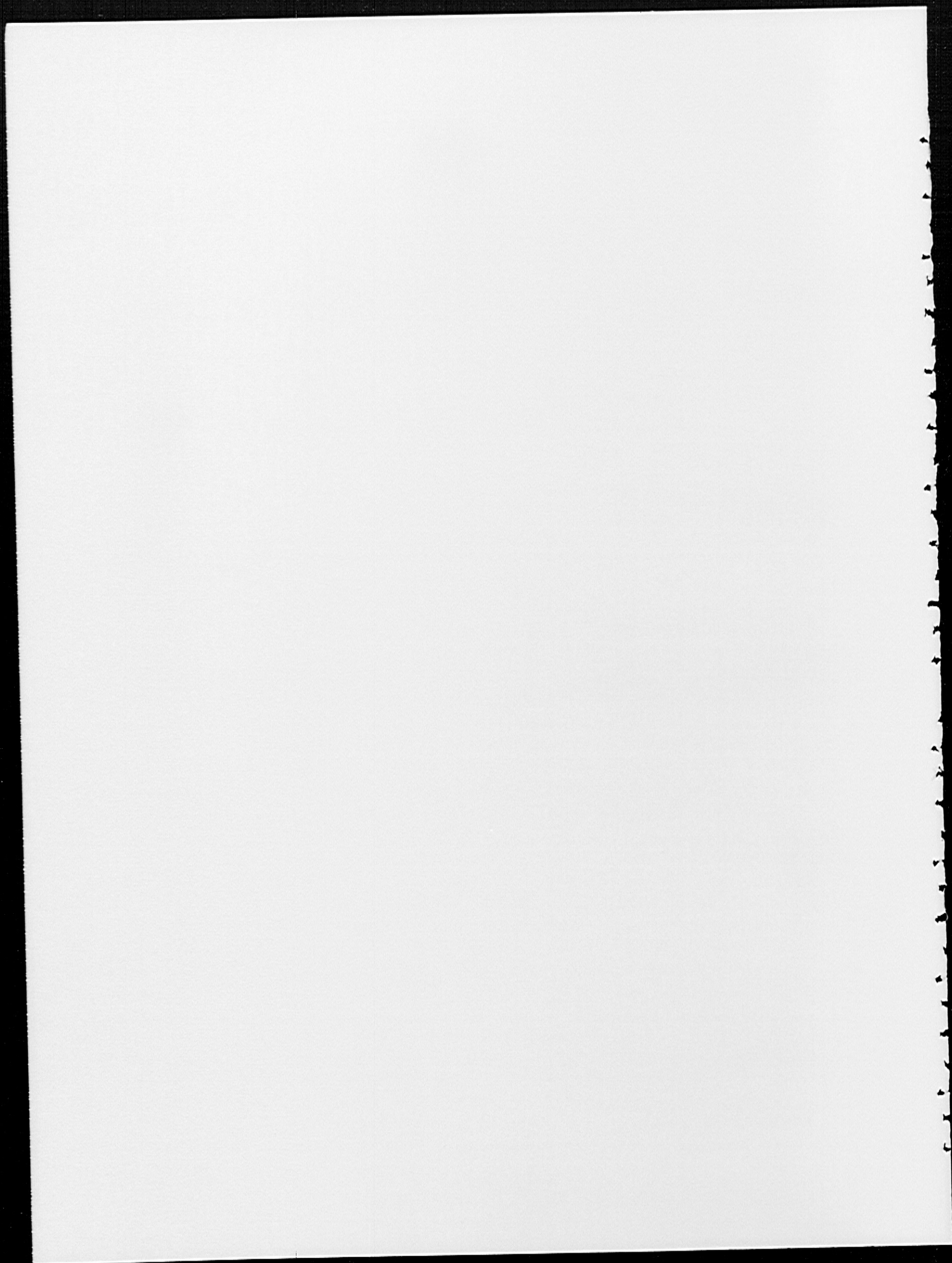
On Petition for Review
of Memorandum Opinion and Order of the
Federal Communications Commission

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and SANGRE de CRISTO BROADCASTING CORPORATION

STATEMENT OF THE ISSUE*

Whether the Federal Communications Commission committed
reversible error in authorizing, without a hearing, Vumore Video

* This case not previously before this Court.

Corporation of Colorado, Inc., to carry on its proposed CATV system in Colorado Springs the signals of the four commercial television stations licensed to Denver, Colorado.

STATEMENT OF THE CASE

A. Nature of Case and of Proceedings Below

By petition for review filed June 12, 1968, pursuant to Section 402(a) of the Communications Act of 1934 as amended (47 U.S.C. Sec. 402(a)) and the Judicial Review Act of 1950 as amended (28 U.S.C. Sec. 2341 *et seq.*), Metropolitan Television Company as the licensee of Television Station KOAA-TV, Pueblo, Colorado, and Sangre de Cristo Broadcasting Corporation as the proposed assignee of said station ("petitioners") seek reversal of a Memorandum Opinion and Order of the Federal Communications Commission ("Commission" or "FCC"), released May 24, 1968 (R. 759-85). In the aforesaid opinion and order, the Commission refused to hold an evidentiary hearing on the public interest consequences of the CATV operation which Vumore Video Corporation of Colorado, Inc. ("Vumore") proposes to inaugurate in Colorado Springs, and which Vumore and others are seeking to establish in Pueblo and Denver: (a) upon the three VHF television stations presently serving Colorado Springs-Pueblo (ranked as the nation's 138th television market); (b) upon the three UHF allocations made, but not yet activated, in that market; and (c) upon Commission policies relative to mass-media diversification and Pay-TV (R. 759-85).

The basic background facts are these: After obtaining a CATV franchise from the City of Colorado Springs, Vumore gave notice on August 16, 1967, pursuant to FCC Rule 74.1105, of its intention to establish a CATV system in the City of Colorado Springs (R. 1-8). During *Phase I* of its proposed operation, subject to the aforesaid notice, Vumore would include on its cable system

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the programs of the three television stations licensed to Colorado Springs and Pueblo¹; the programs of the five VHF stations presently operating in Denver²; and news, weather and music selected from 15 FM stations, including several in Denver, which would be made available on two channels reserved for that purpose — 10 channels in all (R. 137-8).³

On September 18, 1967, in response to Vumore's notice and in accordance with Rule 74.1109,⁴ KRDO-TV filed a timely "Petition for Relief Against Importation of Denver Television Stations" in which it sought an evidentiary hearing on Vumore's proposal (R. 9-20).⁵ Thereafter, on October 19,

¹ Station KOAA-TV (NBC) licensed to the instant petitioner in Case No. 22,024; Station KRDO-TV (ABC) licensed to Pikes Peak Broadcasting Company, the petitioner in Case No. 22,023; and Station KKTU (CBS) licensed to Garvey Communications Systems, Inc., an intervenor in each of these cases.

² KLZ-TV (CBS), KBTU (ABC), KOA-TV (NBC), KWGN-TV (Independent), KRMA-TV (Educational).

³ Later, during Phase II of its proposed operation, Vumore would add 10 more services: the Denver UHF stations, along with independent stations from Los Angeles and San Francisco, coupled with four channels set aside for closed circuit operations (R. 138), thus becoming one of the country's first CATV systems with 20 channels.

⁴ Reprinted in Appendix A are FCC Rules 74.1105, 74.1107 and 74.1109. Under these rules, whenever it is proposed to inaugurate a CATV service in a new community, regardless of its size, notice thereof must be furnished the Commission and persons there designated (Rule 74.1105). Where it is proposed to bring "distant signals" into a market in the top 100, an evidentiary hearing is mandatory absent a waiver (Rule 74.1107). Proposals to bring such signals into a market below the top 100 and proposals to carry "local signals" in any market regardless of size are considered by the Commission on an *ad hoc* basis — in the light of public interest matters brought to its attention (Rule 74.1109(f)). See *Channel 9 Syracuse, Inc. v. FCC*, — U. S. App. D. C. — (Nos. 20,843 and 20,915), 385 F.2d 969 (1967); *Hubbard Broadcasting Co. v. FCC*, — U. S. App. D. C. — (No. 20,924), 385 F.2d 979 (1967); *Buckeye Cablevision, Inc. v. FCC*, — U. S. App. D. C. — (No. 20,274), 387 F.2d 220 (1967) and *Cedar Rapids Television Company v. FCC*, — U. S. App. D. C. — (No. 20,783), 387 F.2d 228 (1967).

⁵ This pleading, by virtue of the express provisions of Rule 74.1105(c), precluded Vumore from carrying "challenged" signals on its CATV system until the matters there raised were decided.

1967, Vumore filed an application to utilize microwave radio frequencies by which to transmit the signals of the Denver stations to Colorado Springs (R. 787-806) "and meet its franchise commitment by providing higher quality Denver television signals to its subscribers" (R. 791). Timely petitions to deny, pursuant to Section 309(d) of the Communications Act (47 U.S.C. Sec. 309(d)), were interposed thereto by KRDO-TV, KOAA-TV, KBTB (Denver), and Rocky Mountain Cablevision, Inc., an unsuccessful applicant for a franchise in Colorado Springs (R. 142-236). Confronted with these objections, and without replying thereto, Vumore asked on December 21, 1967, that its microwave application be dismissed, suggesting that "dismissal renders moot the issues raised in opposition to grant of the application" (R. 266).⁶

In a decision released that same day, after noting the admonitions of this Court in *Channel 9 Syracuse, Inc. v. FCC, supra*, the Commission stated that it was "clarifying pleading standards for waiver petitions in the top 100 markets and requests for special relief in areas below the top 100 markets"⁷ and that it was taking "this occasion to stress the requirements of Section 74.1109 of the Rules, which provides that petitions under that section shall 'state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that such relief would serve the public interest.'" *Central New York Cable TV, Inc.*, 11 RR 2d 1065, 1068 (1967).

Thereafter, in January 1968, KOAA-TV and KRDO-TV (with KKTU's cooperation) retained Robert L. Coe and Dr. James G. Saunders of the School of Communications of Ohio University in Athens, Ohio, and commissioned

⁶ The Commission did dismiss the Vumore application on January 30, 1968, but, noting the "similarity of issues" raised in KRDO-TV's Section 74.1109 objection and its Section 309(d) petition, stated, "We will consider to the extent it is relevant the information contained in the 'Petition to Deny' when we dispose of the mandatory stay matter" (R. 807-8).

⁷ See Public Notice Rpt. No. 112, December 22, 1967.

them, in light of *Central New York*, "to conduct a study of their market, its relationship if any to the Denver market, the history of its economic development with particular reference to television, and the present and proposed CATV systems and what effect they will have on the economic viability of both the present television broadcasting facilities and future facilities (commercial and non-commercial) for which the Commission has made provision in its Table of Allocations" (R. 374). This 130-page study (hereafter termed the "Coe-Saunders Report") (R. 372-499), completed March 10, was duly submitted to the Commission on March 11, 1968.

On March 19, 1968, KOAA-TV filed its "Petition for Special Relief", based principally upon the Coe-Saunders Report, in which it requested that the Vumore proposal be designated for evidentiary hearing, in consolidation with other CATV proposals then pending for the Colorado Springs, Pueblo and Denver television markets (R. 521-6). The request for consolidation had particular reference to a proposal by Pueblo TV Power, Inc. to carry on its proposed CATV system in Pueblo the same Denver signals which Vumore is here seeking to bring to Colorado Springs.⁸

In a Memorandum Opinion and Order released May 24, 1968, the Commission denied the 74.1109 petitions directed against Vumore's proposal by KRDO-TV and KOAA-TV and the petitions of KRDO-TV, KOAA-TV, KBTB (Denver) and the National Association of Broadcasters (NAB) to consolidate into a single evidentiary hearing the Colorado Springs, Pueblo and Denver CATV proposals.⁹ From that action of the Commission, both KRDO-TV and KOAA-TV, by separate petitions since consolidated, have sought review and reversal by this Court.

⁸Timely objections by KRDO-TV and by KOAA-TV to the CATV system proposed for Pueblo, including its request for micro wave facilities, have not yet been acted upon by the Commission.

⁹The action was taken by a 4-2 vote. The "majority" opinion was approved by only two Commissioners (Chairman Hyde and Commissioner Wadsworth). Two other Commissioners concurred in the result (Commissioners Lee and Loevinger). Commissioner Johnson

B. Further Background Matters

The following matters contained in the pleadings filed below by KRDO-TV and KOAA-TV, including those set forth in the Coe-Saunders Report, stand virtually uncontradicted by Vumore:

1. *The Colorado Springs-Pueblo Television Market.* — Colorado Springs and Pueblo constitute a single integrated television market, entirely separate from Denver and other TV markets in the State of Colorado (R. 383-7). It is ranked by American Research Bureau (ARB) as the nation's 138th largest television market (R. 10).¹⁰ Colorado Springs is located 65 miles south of Denver; Pueblo is another 40 miles south of Colorado Springs (R. 404).

Three VHF television stations have operated in this market since 1952-3, each affiliated with one of the three national networks: KKTU (CBS) and KRDO-TV (ABC) licensed to Colorado Springs, and KOAA-TV (NBC) to Pueblo (R. 384). The stations in Colorado Springs provide a Grade A or better service to Pueblo; the Pueblo station provides a like service to Colorado Springs (R. 11). VHF Channel 8 is allocated to Pueblo for educational use and has been applied for by Southern Colorado State College (R. 12-13). The

⁹(Continued)

dissented and voted "for a hearing" (R. 759). Commissioner Cox issued a seventeen-page dissenting opinion (R. 769-85). Commissioner Bartley was absent (R. 759). Thus, this Court does not have before it the reasons of a majority of the Commission for the action here challenged. The case was decided before the Supreme Court on June 10, 1968, affirmed the Commission's broad jurisdiction over CATV operations. *United States v. Southwestern Cable Co.* (Nos. 363 and 428, October Term, 1967), 13 RR 2d 2045 (1968). We think it not inappropriate to note that Commissioner Loevinger, concurring "in the result," dissented to the Commission's *Second Report and Order*, 6 RR 2d 1717 (1966), where the instant rules were promulgated, on grounds that the Commission lacked jurisdiction. See 6 RR 2d at 1812.

¹⁰ A more recent ARB ranking places the market as the 139th (*Television Factbook* No. 38, Services Volume, p. 41-a).

Commission has also allocated three UHF television channels to this market for commercial use: Channel 21 to Colorado Springs and Channels 26 and 32 to Pueblo. No applications are presently pending for these UHF channels (R. 12-13).

As pertinent to this proceeding, Denver to the north (ranked by ARB as the 41st television market in the United States)¹¹ has four operating VHF commercial television stations: KOA-TV (NBC), KLZ-TV (CBS), KBTB (ABC)¹² and KWGN-TV (Independent) (R. 10). In addition, an educational station operates in Denver on VHF Channel 6 (KRMA-TV) (R. 10). Two commercial UHF grants (as yet unbuilt) are outstanding for Denver; applications are pending for a third UHF channel in Boulder, a suburb of Denver (R. 147).¹³

¹¹ According to the 1968-9 *Television Factbook*, *supra*, Denver is now the 39th market (p. 40-a).

¹² The Commission's Memorandum Opinion and Order erroneously gives the network affiliation of KBTB as NBC (R. 759).

¹³ Under Commission precedent, in like circumstances, once the Commission has permitted the importation of VHF signals via CATV, it will also permit the importation of UHF signals from the same market in order to help equalize the coverage of VHF and UHF stations. See, for example, *Greater Television*, 8 RR 2d 1106 (1966). This practice, now based upon case law, has been proposed by the Commission as a rule (Docket No. 17438). In addition, once the Vumore system becomes operative, any Denver UHF stations which placed a *theoretical Grade B signal* over Colorado Springs (as the VHF stations do) could be carried by the system without notice to interested stations and without further authority of the Commission (Rule 74.1105(a)). Such action would obviously have an adverse effect on the development of any UHF stations in Colorado Springs and Pueblo.

Isolated by terrain from Denver, and with surrounding areas largely grazing and semi-arid in character, the major segments of the audience of the three Colorado Springs-Pueblo stations reside in the two core cities (R. 383-4). In fact, 61% to 85% of the persons who view the Colorado Springs-Pueblo stations live in El Paso and Pueblo counties in which Colorado Springs and Pueblo are located (R. 392). With 70% of the population of these two counties located within the corporate limits of the two core cities, the Pueblo-Colorado Springs stations necessarily rely, to a very substantial degree, upon the two cities for their viewing audience (R. 392).

The signals of the Colorado Springs-Pueblo stations, in addition to being received off-the-air in their home counties, are also brought to some 45 small and distant population clusters via translators (R. 427-9; cf. 385). In contrast, there has been little CATV activity to date in this market. Thus, while translators and CATV both had their beginnings "in small markets with little or no television service . . . there was little demand for CATV in the Colorado Springs-Pueblo market. There was no early development of small CATV systems. . . . So today Colorado Springs-Pueblo is also unique in that there are only three or four small operating CATV systems in its entire coverage area, and it was only in recent months that city permits were issued for CATV systems in Colorado Springs and Pueblo" (R. 385).

2. *Present Coverage of Colorado Springs by Denver Stations.* — Although the Denver commercial stations place a *theoretical* Grade B signal over Colorado Springs (but not Pueblo), and although the Colorado Springs (but not Pueblo) stations similarly place a *theoretical* Grade B signal over Denver, rugged mountainous terrain which intervenes between the two markets prevents any significant viewing of the Denver stations in Colorado Springs-Pueblo and vice versa (R. 11, 385-6). ARB surveys show that, between 9 AM and midnight, fewer than 3% of the homes in the Colorado Springs-Pueblo market (0% to 3%) view any Denver station (R. 422). And the number of homes in this market viewing

any of the Denver stations is never more than 1% of all the homes viewing any Denver station (R. 386).¹⁴

The present non-availability of the Denver signals in Colorado Springs is conceded by the City of Colorado Springs and by Vumore. Thus, the City stated: "residents of the City of Colorado Springs have been restricted to the viewing of *three* television stations, all of which have been in operation since the early 1950s" (R. 247).¹⁵ And Vumore — in addition to filing (and then withdrawing) its microwave application to carry the Denver signals in order to meet its "franchise commitment" — has told this Court that its CATV service "is not saleable without the right to furnish available Denver signals".¹⁶

¹⁴ ARB uses various yardsticks to measure television audiences of which the following are the most significant (R. 150-8): (1) Total Television Homes (households with one or more TV sets) in all counties in which any viewing to a particular station is reported; (2) Net Weekly Circulation (number of television homes viewing a particular station at least once per week, 6 AM — 2 AM) upon which market rankings for purposes of Rules 74.1105 and 74.1107 are based; and (3) Average Daily Circulation (television homes reached by a particular station on each day of the week). Comparing the largest station in each market (1967), the following figures were shown below (R. 150-8): (1) Total Television Homes: 129,600 (Colorado Springs-Pueblo) to 552,100 (Denver); (2) Net Weekly Circulation: 118,700 (Colorado Springs-Pueblo) to 431,400 (Denver); and (3) Average Daily Circulation: 91,700 (Colorado Springs-Pueblo) to 325,500 (Denver). Such figures as these are based upon Nation-wide Sampling Sweeps taken by ARB twice each year (Spring and Fall). In addition, each market may order additional and more detailed program-by-program surveys. The 0-3% and 1% figures given in the text are based upon three such surveys conducted in Colorado Springs-Pueblo on November 2-22, 1966; February 15-March 14, 1967; and November 1-28, 1967 (R. 421).

¹⁵ Emphasis supplied unless otherwise indicated.

¹⁶ "Vumore's Opposition to Motions for Stay Pending Judicial Review" (Nos. 22,023-4, June 21, 1968), p. 44; see also *Midwest Television, Inc. (KFMB-TV)*, 13 RR 2d 698, 723 (1968).

3. *Vumore and Other Interrelated CATV Proposals.* — Vumore is owned by Vumore Company (50%), by Daniels & Associates, Inc. (33-1/3%), and by a group of Colorado Springs businessmen (16-2/3%) (R. 16). Vumore Company is a wholly-owned subsidiary of RKO General, Inc. which is in turn a wholly-owned subsidiary of General Tire and Rubber Company (R. 101). RKO General, through various subsidiaries, is a major broadcaster, holding licenses for seventeen radio and television stations in New York, Los Angeles, Boston, San Francisco, Washington, D. C., Memphis, Hartford and Windsor, Ontario (Detroit). RKO General is also a leading proponent of Pay-TV. See *Connecticut Committee Against Pay-TV v. FCC*, 112 U. S. App. D. C. 248, 301 F.2d 835 (1962). Vumore Company owns and operates CATV systems in 33 cities west of the Mississippi (R. 101-2).¹⁷

The Daniels group is no less active in the CATV industry. Mr. Bill Daniels has been described as a leading owner and consultant on CATV systems in the United States. His organization (Daniels & Associates, Inc.) owns or operates 86 CATV systems throughout the United States (R. 102-3).

In addition to the 20-channel system which Vumore proposes for Colorado Springs and the 20-channel system which Pueblo TV Power, Inc. proposes for Pueblo, notifications of franchise awards and proposed commencement of 20-channel service (including importing Los Angeles and San Francisco signals) have been given by various corporations owned by the RKO General-Daniels combine for the unincorporated areas of Jefferson County, Colorado, including Englewood, Edgewater, Littleton, Sharon, Adams, and Arapahoe County by *Mountain States Video, Inc.* (CATV 100-297); for the unincorporated areas of Weld County by *Greeley Video, Inc.* (CATV 100-300); for Longmont, Colorado by *Longmont Video, Inc.* (CATV 100-324); for

¹⁷ According to *Broadcasting Magazine*, July 8, 1968, p. 5, RKO General is "quietly" seeking CATV rights for Brooklyn, Queens, Bronx and Staten Island, New York City.

Greeley, Colorado by *Greeley Video, Inc.* (CATV 100-325); for unincorporated areas of Larimer County by *Fort Collins Video, Inc.* (CATV 100-326); and for Loveland, Colorado by *Loveland Video, Inc.* (CATV 100-323) (R. 167-80). All of these areas are part of the Denver television market. According to the best information available, RKO General-Daniels have franchises for *at least* 25 systems in the Denver-Colorado Springs-Pueblo area, "seeking to blanket the 750,000 people living on Colorado's eastern slope" (cf. R. 167-80).¹⁸

4. *Impact of CATV Proposals on Local Stations.* — As documented in the Coe-Saunders Report, the importation of the Denver signals into Colorado Springs will produce an audience loss (and thus a revenue loss) which will require the Colorado Springs-Pueblo stations either to curtail or eliminate "local news" and "local programming other than news" (R. 398-9, 479). It was there further shown that the Commission's non-duplication rules could not obviate these consequences. (R. 479).¹⁹

¹⁸ See *Broadcasting Magazine*, May 20, 1968, p. 48. This information was largely gleaned from newspaper and trade press articles and FCC public notices (and thus brought to the Commission's attention as it became available) since the Commission does not require a CATV entrepreneur to disclose either the ownership of its system or other business interests; the agency has not yet developed a unified system from which the ownership of CATV systems can be ascertained; and the Commission made no *ad hoc* inquiry or findings in this case. However, the allegations, as to other CATV ownership and plans therefore have never been denied by Vumore.

¹⁹ Rule 74.1103 would require Vumore, upon request by the local stations, to delete any programs telecast by the Denver stations which would duplicate those carried by a Colorado Springs-Pueblo station that same day. Since stations in these markets typically carry network programming simultaneously, this rule would be effective in protecting the Colorado Springs-Pueblo stations from duplication of their network programs. However, since the scheduling of local programming (news, films, syndicated and other) would seldom coincide in the two markets, the one-day "blackout" rule would not be effective to prevent their duplication (R. 398-9).

Operating expenses of the stations in the Colorado Springs-Pueblo market have been unusually high for two principal reasons: First, networks do not supply interconnection facilities for this market and the stations therefore have had to construct and maintain their own interconnections (R. 395); second, they have had to develop and maintain extensive facilities and staffs for the production of local programming – and necessarily so (R. 395). As shown by Coe-Saunders, the stations receive a smaller share of their revenues from national and regional spot advertisers (40.5% as compared to a national average of 59.7%) and thus a larger than normal share of their revenues from local advertisers (36.6% as compared to a national average of 23.7%) (R. 394). Moreover, this reliance upon local (as opposed to national) revenues is likely to increase since national spot revenues have shown a tendency to plateau in recent years and an increasing proportion of national spot dollars is going to larger markets with a correspondingly smaller share going to markets below the top 50 (R. 395).

The aggregate net income²⁰ during each of the years 1960 to 1967 for the three television stations serving the Colorado Springs-Pueblo market was as follows (R. 460):

1960	\$ 43,200
1961	(28,800)
1962	(12,300)
1963	(55,600)
1964	113,100
1965	229,100
1966	190,300
1967 ²¹	76,878

²⁰Contrary to a statement in the decision here under review (R. 765), depreciation was specifically set forth in the Coe-Saunders Report as an expense item (R. 437-50).

²¹The 1967 figure was brought to the Commission's attention in a pleading filed April 19, 1968 – more than a month before the decision here complained of was released on May 24, 1968.

Throughout this period, the ratio of the stations' expenses to their revenues has remained unusually high (R. 460). With a national average of \$81 in expense for each \$100 in revenue, the stations in Colorado Springs-Pueblo have incurred, in expense for each \$100, \$97 (1960); \$102 (1961); \$100.8 (1962); \$103.5 (1963); \$93.6 (1964); \$88.8 (1965); and \$90.8 (1966) (R. 460).

In addition to these general market considerations, however, the stations emphasized to the Commission that they obtained a majority of their revenues *in non-network periods* during which the Commission's non-duplication rules would be of no value to them (R. 399, 479-85). Moreover, the stations submitted a detailed analysis of programming costs and demonstrated that the "local news", and "local other than news" programming carried by them is either at a break-even point or at substantial loss (R. 479-85). Thus, during 1967, KOAA-TV made a profit of \$10.80 per hour during network time; its programming, local other than news, was operated at a break-even point; and its local news programming was operated at a loss of \$169.20 per hour and at a loss for the year of \$49,771 (R. 482).

KRDO-TV, again during 1967, obtained a profit of \$53.40 per hour from its network programming but operated its local other than news programming at a loss of \$53.84 per hour (annual loss of \$120,890) and operated its local news at a loss of \$59.14 per hour (annual loss of \$16,265) (R. 485).

As the stations concluded in their submissions to the Commission (R. 487-90) — what is, in any event, self-evident — these local program services, being the most expensive and operated at a loss, obviously offer the greatest potential for expense reductions (R. 479, 487-90).²²

²² During 1966-67, in a typical week, the Colorado Springs-Pueblo stations carried 29 hours and 59 minutes of local programming, 32 hours and 10 minutes of news, 10 hours and 37 minutes of public affairs programming, and 15 hours and 15 minutes of other programming (excluding entertainment and sports) (R. 492-3).

To illustrate further the impact of Vumore's CATV proposal on the three stations licensed to Colorado Springs-Pueblo, reference was made to the experience with CATV in Bakersfield, Calif. (R. 465-77). There during non-network hours, the local stations lost to CATV between 35% and 59% of the audience otherwise available to the local stations (R. 782).²³

Moreover, the Bakersfield experience demonstrated that despite a steady and normal growth in *population* in the market, both prime time and non-prime time *audiences* for the local stations commenced to drop in 1966 (the year the CATV began operating) and continued to show a substantial decline through 1967 (R. 468).

Using as a base the 90,000 television homes in Colorado Springs and in Pueblo, the Coe-Saunders Report made various estimates as to revenue losses (allocating \$26 in revenue per viewer as the market's history justifies), based on the number of viewers subscribing to CATV and the extent to which viewing to the Denver stations actually occurred (R. 472, 474). Assuming a 25% figure for CATV subscribers²⁴ with 30% of these subscribers watching the Denver stations (conservative in view of the Bakersfield experience), the

²³ The Court will realize that at this early stage in the development of CATV, it is not easy to find perfectly analogous market situations where CATV has been in operation for a sufficiently long period of time to permit precise determinations as to its ultimate impact. Bakersfield, with three operating stations each affiliated with a network – two of which commenced operation in 1953, the third in 1959 – and ranked by ARB as the nation's 144th market (as opposed to 138th for Colorado Springs-Pueblo) furnished a fair and reliable basis for predicting the effect of CATV. The CATV system there (commencing operation in September 1966) and having obtained a substantial number of subscribers carries Los Angeles signals otherwise not readily available to the area. ARB studies indicate that cable homes viewed these distant signals 35% to 59% more, during non-network hours, than did non-cable homes (R. 782).

²⁴ Vumore already has 10,000 to 11,000 potential subscribers in Colorado Springs alone. See "Vumore's Opposition to Motions for Stay Pending Judicial Review", filed June 21, 1968 in Nos. 22,023-4, pp. 44-45.

Colorado Springs-Pueblo market faces a prospective loss of revenues of \$123,240 (R. 474). Using a 60% penetration figure with 70% viewing the Denver stations, projected revenues losses would run as high as \$687,960 per year (R. 474).

But even assuming a reduction in revenues of \$200,000 – described as “highly probable immediately” – a loss of this magnitude (10%), keeping in mind that the stations’ expenses are now running around 90% of their revenues, could mean “the closing of at least one, if not more, local stations” (R. 473).

Certainly, going back to the substantial expenses entailed in producing local news and other programming and the losses experienced by the stations in carrying such programs, an even less substantial reduction in revenues would necessitate a substantial curtailment of such programming (R. 479, 486-90).

Finally, it was pointed out in the Coe-Saunders Report (R. 398) that the long-range effect of carrying the Denver stations in Colorado Springs-Pueblo would be to merge the two markets. If a network can effectively reach most of Colorado Springs – through CATV systems carrying the Denver affiliates in the two core cities – that network is not likely to pay for substantial duplication of its programming by local stations licensed to communities so served by CATV. National advertisers – able to reach the heart of the Colorado Springs-Pueblo market via CATV – could obviously follow suit. Thus, CATV could readily make Colorado Springs-Pueblo effectively a satellite of Denver.

While Coe-Saunders did not contend that the present economy of this market would support the activation of the three UHF channels assigned to this market, operating as they must without a network affiliation, it was pointed out that the prospects for growth in the market’s audience and in its revenues reasonably allowed the prediction that at least one UHF independent operation could be expected and supported within the next four years, assuming no “audience fragmentation due to CATV entry” (R. 462).

If the market, for example, could yield \$3,000,000 in revenues by 1971 (as opposed to its current \$2,000,000), as the result of normal growth and increased revenues which a new station produces,²⁵ an independent station with 15% of the audience should be able to generate rather quickly the \$400,000 cash flow estimated as necessary for a fourth station (R. 459).

In addition, such a station, avoiding the cost of importing network programming and minimizing other costs at least in its initial stages, could be expected to improve on the relatively low revenue per viewer figure of the network stations (\$26.60) (R. 458-9).²⁶ In either event, or in a combination of developing circumstances, the possibility for the activation of a fourth station was considered entirely feasible (R. 401, 462).

The foregoing projections and their bases were neither challenged nor answered by Vumore or by the City of Colorado Springs.

SUMMARY OF ARGUMENT

I

In adopting procedures for the regulation of CATV systems in its *Second Report and Order*, the Commission – while adopting a requirement for mandatory evidentiary hearings in the top 100 markets – also recognized the existence of “substantial problems affecting the public interest” arising from CATV proposals in areas below the top 100 markets. *Second Report and Order*, 6 RR 2d 1717 (1966). To deal with such problems, the Commission adopted

²⁵ The appearance of a fourth television station generally produces a 10% increase in the market's revenues (R. 459).

²⁶ Thus, it was pointed out that in markets with comparable gross incomes, the revenue per viewer figure is significantly higher: Greenville, N.C., \$30.07; Odessa, Texas, \$28.89; Ft. Wayne, Ind., \$30.94; Las Vegas, Nevada, \$52.81 (R. 459).

Rules 74.1105 and 74.1109 – calling for notice to interested persons and the filing of objections – and promised to “take such action as may be necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention.” *Second Report and Order, supra* at para. 146.

Petitioners demonstrated to the Commission below that the Vumore CATV proposal for Colorado Springs is *prima facie* inconsistent with three of the Commission’s principal objectives in the regulation of television broadcast services: *first*, to provide competitive broadcast facilities available for local programming and self-expression; *second*, to achieve this through effective use of UHF channels; and *third*, to promote maximum diversification in the control of media of mass communication. *United States v. Southwestern Cable Co.*, ___ U. S. ___, 13 RR 2d 2045 (June 10, 1968); *Clarksburg Publishing Co. v. FCC*, 96 U. S. App. D. C. 211, 225 F.2d 511 (1955); *Regulation of CATV Systems*, 4 RR 2d 1679 (1965).

In their presentation below, petitioners, delineating these public interest questions in specific and detailed fashion, made a more than adequate threshold showing justifying an evidentiary hearing through the submission of “an articulated statement of some fact or situation which would tend to show, if established” that authorization of the CATV system in question would contravene the public interest, convenience and necessity. *Federal Broadcasting System v. FCC*, 96 U. S. App. D. C. 260, 263, 225 F.2d 560, 563 (1955); *L. B. Wilson, Inc. v. FCC*, ___ U. S. App. D. C. ___ (No. 20,845), ___ F.2d ___, 13 RR 2d 2031 (1968); *Clarksburg Publishing Co. v. FCC, supra*.

II

The decision of two members of the Commission in denying the relief here sought: (a) fails adequately to explain why the Commission has refused to consider the public interest ramifications of CATV systems being proposed throughout central Colorado (*cf. Interstate Broadcasting Co. v. FCC*, 109 U. S. App. D. C. 190, 285 F.2d 270 (1960)); and (b) fails to state the bases for its conclusions and to dispose rationally and concisely of the public interest considerations necessary to support its action. *West Michigan Telecasters, Inc. v. FCC*, ___ U. S. App. D. C. ___ (No. 21,396), ___ F.2d ___, 13 RR 2d 2039 (1968).

Finally, if the Commission is attempting to establish new standards for the future for the disposition of Rule 74.1109 objections, the decision fails adequately to delineate these standards. *Cf. KGMO Radio-Television, Inc. v. FCC*, 119 U. S. App. D. C. 1, 336 F.2d 920 (1964).

ARGUMENT

I

The Commission Erred in Not Ordering an
Evidentiary Hearing on Vumore's Proposal

The Commission in its *Second Report and Order*, released March 6, 1966, 6 RR 2d 1717, asserted jurisdiction over all CATV systems throughout the country, whether or not served by microwave facilities, action since sustained by this Court and by the Supreme Court.²⁷ That assertion of jurisdiction was

²⁷ See *Channel 9 Syracuse, Inc. v. FCC*, ___ U. S. App. D.C. ___ (Nos. 20,843 and 20,915), 385 F.2d 969, 11 RR 2d 2025 (1967); *Hubbard Broadcasting Co. v. FCC*, ___ U. S. App. D. C. ___ (No. 20,924), 385 F.2d 979, 11 RR 2d 2063 (1967); *Cedar Rapids Television Co. v. FCC*, ___ U. S. App. D. C. ___ (No. 20,783), 387 F.2d 228, 11 RR 2d 2034 (1967); *Buckeye Cablevision, Inc. v. FCC*, ___ U. S. App. D. C. ___ (No. 20,274), 387 F.2d 220, 10 RR 2d 2027 (1967); *U. S. v. Southwestern Cable Co.*, ___ U. S. ___, 13 RR 2d 204 (1968).

bottomed on the following concepts: (1) "Congress has only recently reaffirmed the goal of 'an effective national television' system through the use of UHF channels . . . 'for at least four commercial stations in all large centers of population' " in order to make possible a fourth national network and bring added diversity. *Regulation of CATV Systems (Docket No. 15971)*, 4 RR 2d 1679, 1696-7 (1965). As subsequently stated by the Supreme Court, this is to be done through a system which would make stations available particularly "for local self expression". *United States v. Southwestern Cable Co.*, ___ U. S. ___, 13 RR 2d at 2056; (2) "Congress has also determined that *the way to achieve the above goal is through effective use of UHF channels* since most large centers of population now have three full network stations and no unoccupied VHF frequencies." *Regulation of CATV Systems, (Docket No. 15971)*, 4 RR 2d at 1697; (3) To achieve this goal, the Congress, at the expense of many millions of dollars to the public each year, enacted, in 1962, the All-Channel Set Legislation. (47 U.S.C. Sec. 303(s)). "There is every present indication that the all-channel set requirement is having its desired effect, and that the legislative goal is *in the process* of being realized." *Ibid*, at 1697. In this connection, the Commission noted (at p. 1697) "that UHF stations face considerable obstacles during this crucial period. UHF must overcome the psychological factor of its previous failure in intermixed markets." The Commission therefore stressed (at p. 1697) "*that it will not now take action which would be inconsistent with the Congressional goal* and which might jeopardize the 'investment in all-channel receivers' . . . which has been asked of the American public."

It is self-evident, and the Commission has so concluded,²⁸ that unregulated development of CATV systems, carrying numerous television signals not otherwise available, would reduce the audience of local stations to the point

²⁸*Second Report and Order, supra*, 6 RR 2d at 1777.

that UHF would not develop as expected and local stations would find it necessary to shut down or reduce their program offerings, particularly those directed to local needs and those of a public service nature. *Cf.* Coe-Saunders Report (R. 401).

The CATV systems which would produce these results have significant limitations in their value to the public. *First*, they do not have the public service responsibilities and commitments imposed upon broadcasters, through the licensing scheme.²⁹ *Second*, their service is available only to those willing and able to pay a fee.³⁰ *Third*, in the present state of the art, they are unable to provide, and do not provide, service to rural areas.³¹

The *Second Report and Order* establishes procedures by which the Commission can scrutinize proposed CATV operations and their public interest consequences *in advance of their effectuation*. The rules provide (74.1107) that in the first 100 television markets, as defined and ranked by ARB, an evidentiary hearing will normally be required before a CATV system may commence operation carrying "distant signals", i.e., those of stations which do not in fact place a Grade B signal into the community where the system would operate.

In dealing with CATV operations in markets below the top 100 (such as Vumore's proposal for Colorado Springs), the Commission requires CATV systems to give notice to interested stations of their intention to initiate a new CATV operation or to include on an existing system any additional "distant" signals (Rule 74.1105).³²

²⁹ See *First Report on Microwave Relays*, 4 RR 2d 1725, 1743-4 (1965).

³⁰ *Ibid.*, at 1743.

³¹ *Second Report and Order*, *supra*, 6 RR 2d at 1778.

³² In other words, this notice is required before any *new CATV system* can commence operation, even those proposing to carry only "local" stations. For existing CATV systems, the notice is required only when it is proposed to add a "distant" (but not a "local") television signal.

In its Rule 74.1109 the Commission then delineates procedures by which "an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or . . . any other interested person" may, upon petition, formal or informal, object to any notification given under Rule 74.1105. And upon the timely filing of such an objection (within 30 days of the notice), "new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition" (Rule 74.1105(c)).

The Commission further provides that it will deal with such objections in the following manner (Rule 74.1109(f)):

"The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of §74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures."

In adopting this procedural dichotomy – mandatory evidentiary hearings on CATV proposals to carry "distant" signals in the top 100 markets and *ad hoc* consideration of CATV proposals in markets below the top 100 – the Commission stated its reasons therefor in the *Second Report and Order* (para. 146) as follows:

"We think, therefore, that a *fair compromise* is to draw the line as to special attention (i.e., evidentiary hearings) at the 100th market, and below that point, simply to take *such action as may be necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention.*"

In providing for an evidentiary hearing on an *ad hoc* basis in markets below the top 100, the Commission explained its reasons as follows (*Second Report and Order* (para. 145)):

"Admittedly, there can be substantial problems affecting the public interest where the CATV system proposes to extend the signals of broadcast stations beyond the Grade B contour into areas below the top 100 markets. But there are differences between the two situations which call for different procedures. In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated."

As recognized by the Commission, although CATV systems are normally required to carry all stations providing a Grade B service to a given community (see Rule 74.1103), there can be situations where the carriage of such signals by CATV systems "might be changing . . . viewing habits" and therefore the system would truly be introducing for the first time into a given community the signal of a station which – while theoretically or, in fact, present – was not actually a factor in the market. As a consequence, the Commission stated, *Second Report and Order* (footnote 69):

"If two major markets each fall within one another's Grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations."

Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise."

While the Commission envisioned that such instances would "rarely arise", the fact of the matter is that, considering the number of CATV cases which have been designated for hearing since the *Second Report and Order*, the problem has arisen with some frequency.³³ Thus, the bare technical presence of a *theoretical* Grade B signal has not been dispositive of the public interest questions raised by CATV proposals.

The Commission has, pursuant to the 74.1109 procedures, designated for evidentiary hearing CATV proposals for markets below the top 100. See *Taft Broadcasting Company (WKYT-TV)*, 8 RR 2d 1092 (1966) and *United Transmission, Inc.*, 9 RR 2d 482 (1967). Where it has refused a hearing in these areas, it has been able to point out — consistent with paragraph 145 of the *Second Report and Order* but *inconsistent with the facts in this case* — that, because of the paucity of service, any new station would presumably, be network-affiliated and therefore protected, to some degree, by the exclusivity rules. See *Alice Cable Television Corp.*, 5 RR 2d 606 (1965), *aff'd.* by Commission January 27, 1967 (FCC 66-1160).

³³ The first major case designated for hearing involved the question whether a CATV system in San Diego should be permitted to carry the signals of Los Angeles stations which theoretically furnish a Grade B service to that community. *Midwest Television, Inc.* 8 RR 2d 278 (1966). The Commission's decision in that case, *after hearing*, *Midwest Television, Inc. (KFMB-TV)*, *supra*, released June 28, 1968, generally prohibits the carriage of Grade B signals. Similarly, the Commission's Order of Designation in the Philadelphia CATV case, *Delaware County Cable Television Co.*, 12 RR 2d 1225 (1968), requires a determination as to whether systems in that market should be allowed to carry the signals of certain New York City stations which provide a theoretical Grade B service to communities within the heart of that market and, indeed, to the City of Philadelphia itself. The Commission's Order of Designation of CATV proposals in the Peoria television market requires a determination as to whether the signals of two stations from the Quad-Cities television market should be carried by the CATV system even though those stations provide theoretical Grade B service to Peoria. See *General Electric Cablevision Corporation*, 10 RR 2d 226 (1967).

Thus, the public interest considerations which led the Commission to regulate CATV are essentially the same whether the system is within or below the top 100 markets. But factual characteristics, *generally but not necessarily* distinguishing the two areas, led to Rule 74.1107, on the one hand, and Rules 74.1105 and 1109, on the other, "with only a slight procedural difference between the top 100 and the smaller markets."³⁴ As the Commission held in *Midwest Television, Inc. (KFMB-TV)*, *supra*, 13 RR 2d at 712:

"The sole difference is that the burden of proceeding and of proof lies on the CATV system in the case of distant signal proceedings under Section 74.1107(b) and is largely on the petitioning broadcaster in a footnote 69 proceeding arising under Section 74.1107(d) and Section 74.1109 . . ."

Thus, the Commission has never purported to say — and it has not said here — that there can never be problems arising from CATV operations in the nation's smaller markets. Indeed, it was CATV operations in such markets that first brought potential public interest problems to the Commission's attention. As the Commission observed as long ago as 1959,³⁵ speaking of the effect of the importation into the small markets of numerous distant signals by CATV systems:

" . . . instead of the *small audience* being split two ways, as it would be if a competing local station were involved, it is split *four or five* ways. Therefore, the small market may often have more signals available than the larger 'metropolitan' city from which signals are distributed via the auxiliary service."

And, indeed, it was in one of the nation's smaller markets that the Commission first refused to allow the unlimited expansion of a CATV system when it determined, *after hearing*, that there would be adverse effects upon the local station.

³⁴ Commissioner Loevinger, concurring in part and dissenting in part, in *United Transmission, Inc.*, *supra*, 9 RR 2d at 486.

³⁵ *CATV and TV Repeater Service*, 18 RR 1573, 1585 (1959). The second emphasis is in the Commission's report.

Carter Mountain Transmission Corp. v. FCC, 116 U. S. App. D. C. 93, 321 F.2d 359 (1963), *cert. den.*, 375 U. S. 951.

Finally, and seeming to follow this consistently acknowledged concern over the effect of CATV in the smaller markets, the Commission has taken pains in its instant decision, to set forth its "most immediate objections [to the presentation] in the hope they will be met in any similar filings in the future" (R. 765).

Thus, in not ordering an evidentiary hearing on the public interest matters here raised, the Commission committed reversible error. The petitioners were required to show no more than they did show. And, the Commission *cannot reasonably expect*, for relief under Rule 74.1109, *more than the Coe-Saunders report from any station in a market, small or large.*

Addressing themselves to the precise public interest problems which the Commission has recognized can arise from CATV operations, the petitioners made a *prima facie* showing that the Vumore CATV proposal: (1) represents an immediate threat to the continued operation of the three existing Colorado Springs-Pueblo stations and certainly to their continued ability to carry expensive local and public service programming; (2) is incompatible with the activation of the market's UHF channels which, otherwise, could reasonably be expected, in the near future; and (3) presents serious mass media diversification problems, in light of the extensive other broadcast and CATV holdings of Vumore, nationally and in Denver and Colorado Springs-Pueblo, and its past and present associations with Pay-TV and potential for program originations.

Thus, petitioners presented "an articulated statement of some fact or situation which would tend to show, if established," that authorization of the CATV system would contravene the public interest. *Federal Broadcasting System v. FCC*, 96 U. S. App. D. C. 260, 263, 225 F.2d 560, 563 (1955); see also, *L. B. Wilson, Inc. v. FCC*, *supra*, and *Clarksburg Publishing Co. v. FCC*, *supra*.

The presentation of these petitioners — far more than a “bare bone” recitation of conclusions³⁶ — was fully supported and documented by specific facts concerning the financial positions of the stations in question; the characteristics of the television market in terms of its audience and their location; the potential of the market to support additional television stations, specifically UHF stations; the public service and local programming being produced by the stations in the market; the cost of this programming to the stations and the revenues derived from it; why the Commission’s non-duplication rules would not provide adequate protection in the special circumstances of this case; the other CATV and broadcast interests of the entrepreneur, Vumore; the probable plans of Vumore for program originations and the association of some of its principals with “Pay-TV”; and numerous other facts relevant to the characteristics of the market generally and, specifically, as relevant to television operations.

These facts were not simply “thrown at” the Commission but were subjected to a reasoned and articulate analysis by two men of substantial qualification and extensive experience in the television industry. In short, as well-put by NAB:

“NAB’s study of the submissions of KOAA-TV and KRDO-TV leads it to conclude that if these submissions are not adequate to require further inquiry by way of evidentiary hearing, it is impossible to say what submissions would be adequate.”³⁷

³⁶ Compare *Cedar Rapids Television Co. v. FCC*, *supra*, 387 F.2d at 232, 11 RR 2d at 2039.

³⁷ “Statement of National Association of Broadcasters in Support of ‘Petition for Continuance of Temporary Stay Pending Judicial Review’,” (filed in this proceeding below on April 22, 1968), p. 3.

II

The Commission Failed to Set Forth
Adequate Reasons Explaining Its
Action

As this Court had recent occasion to note, "in order for a court to exercise in any meaningful way its function of review, it is necessary that the Commission state specifically the basis for each of its conclusions." *West Michigan Telecasters, Inc. v. Federal Communications Commission*, ___ U. S. App. D.C. ___ (No. 21,396), ___ F.2d ___, 13 RR 2d 2039, 2042 (1968). The Memorandum Opinion and Order here challenged is no more than a "collection of conclusory comments." It is replete with errors and inconsistencies:³⁸

A. *Refusal to Consolidate Other CATV Proposals in the Area and to Consider Their Cumulative Impact.* — The Commission stated as follows its reason for not consolidating the Denver CATV proposals with Vumore's for Colorado Springs (R. 760): "It is our policy not to include pending requests under Section 74.1107 in consideration of requests for special relief filed pursuant to Section 74.1109" Yet, in its Memorandum Opinion and Order in *Delaware County Cable Television Company et al.*, *supra*, released on April 26, 1968, two weeks after public announcement of its action here, the Commission granted requests for special relief filed under Rule 74.1109 against the carriage of theoretical Grade B signals from New York City and consolidated them with requests, under Rule 74.1107, for the importation of "distant signals", specifying a fourth issue (in addition to the standard three used in

³⁸ Commissioner Cox, in his dissent, points out additional errors and discusses each Commission holding in some detail (R. 769-85).

CATV cases).³⁹ "To determine whether carriage of predicted Grade B or better signals from New York City stations should be authorized."

As for its refusal to consider the Pueblo CATV proposal – affecting directly the second of the two core cities in this market – the Commission speaks only of "expedition".⁴⁰ The Commission has recognized that, in order to assess the impact on television services, it must consider all proposals for a single market in consolidation. That is certainly its normal practice – at least in the major markets. See Rule 74.1107(e) and *CATV Regulation*, 9 RR 2d 1550 (1967). Realistically, this is the only way in which the true effects of CATV services can be assessed. As this Court observed in an analogous situation in *Interstate Broadcasting Co. v. Federal Communications Commission*, 109 U. S. App. D.C. 190, 192, 285 F.2d 270, 273 (1960):

"... Moreover, [the allegations] show the dispute now at bar to be part of a larger potential development of interference, and so the specific factual allegations take on greater stature than they would have in isolation. Such is frequently the case in respect to lawsuits over small specific facts involving large problems in total facts or important principles of law. If, for example, the entire service area of Interstate were to be chipped away in small bits by separate actions, each upon the same basic grounds, and if Interstate had no standing to

³⁹ The Commission's three standard issues in CATV cases require determinations: (1) as to all CATV proposals in a given market; (2) their cumulative impact upon existing stations and potential UHF stations; and (3) plans for program originations and Pay-TV and their effect upon existing and potential stations – the precise areas of inquiry which the stations here sought.

⁴⁰ The Commission states, "We have taken into account the prospect of CATV in Pueblo and – to the extent possible the potential impact in both communities" (R. 760). However, Pueblo is never again mentioned in the Opinion and we are at a loss to know how, or in what way, the impact of that proposal or the cumulative impact of both proposals was considered.

protest the loss of any small bit, its ability to protest the loss of the whole area, or to protest the basic ground of its destruction, would be denied. We think this total denial of the right to a hearing *cannot be achieved by a piecemeal treatment*. The facts as to each small loss must be alleged, as we held in the Big River case, specifically and concretely But, if they are so alleged, and if it be shown that the small facts are part of a much larger factual picture, the smallness of the immediately disputed facts cannot deny the protestant his right to a hearing"

In line with *Interstate*, "expedition" cannot justify the "piecemeal treatment" which was accorded petitioners here.

B. Refusal to Find Non-Coverage of Colorado Springs by Denver Stations. — The Commission indicates that the stations should have submitted "engineering evidence" to prove the fact that the Denver stations are not viewable in Colorado Springs when that is what ARB statistics show beyond question and contradiction; when Vumore itself applied for microwave authority to supply signals from these stations;⁴¹ when the City of Colorado Springs in its filings acknowledged this fact; and when the Coe-Saunders Study proves, without contradiction, that the viewing of Denver stations in the Colorado Springs market (which extends northward in the direction of Denver beyond the Colorado Springs city limits) is "negligible". Thus, no one on this record has seriously contended, including Vumore, that the Denver stations are generally available for viewing in Colorado Springs. See *Albertson v. Federal Communications Commission*, 87 U. S. App. D.C. 39, 43, 182 F.2d 397, 401 (1950). In fact

⁴¹ As the Commission held in its subsequent (June 28, 1968) *Midwest Television, Inc. (KFMB-TV)* decision, *supra*, 13 RR 2d at 723, "The microwave application to bring Los Angeles signals to Escondido gives rise to a reasonable inference that Los Angeles signals are not well-received there."

Vumore insists that the Denver signals are essential to make its service "saleable" — in *Midwest Television, Inc. (KFMB-TV)*, *supra* at 723, the "most telling" point to prove present lack of service. Moreover, the decision to which the Commission refers (R. 763) in support of this requirement was not released until February 28, 1968, *cf. KGMO Radio-Television v. Federal Communications Commission*, *supra*.

C. Effect of Proposed CATV Service Upon Existing and Potential Stations. —

While conceding that "it is likely" that carriage of the Denver signals could have some economic effect on existing and potential stations, the Commission states that it is not convinced that this "potential impact would be sufficient to limit the viability of existing or potential stations" (R. 763-4).⁴²

There is nothing in this record to support such a conclusory statement.

Vumore presented no studies whatsoever; no facts; and no analysis concerning the effect of its services upon the local stations, present or potential. Its presentations consisted, largely, of attacks upon the "good faith" of KRDO-TV, never addressing itself to the merits (R. 29-87).

Similarly, in paragraph 7(g), the Commission states that "their analysis" fails to indicate any "likelihood of UHF activation in at least the near future" (R. 764). But the Commission fails either to state or recite upon what basis or upon what facts its conclusions are premised. Nor does it recite or explain the numerous specific facts upon which the stations relied for a contrary conclusion.

⁴² Thus, the decision does not even address itself to, let alone dispose of, the effect upon local programming services. Compare *United States v. Southwestern Cable Co.*, *supra*, 13 RR 2d at 2056.

All we can glean from the conclusions in the Commission's decision is that here it was unpersuaded — for reasons nowhere explained, *West Michigan Telecasters, Inc. v. Federal Communications Commission, supra* — thus imposing upon petitioners a standard of pleading that is not articulated and is, under *Federal*, unreasonable and unwarranted. Yet, in its *Midwest Television, Inc. (KFMB-TV)* decision (at pp. 711-12), the Commission made these observations upon the nature of CATV proceedings and evidence compiled *after extended hearings*:

“... since future events, such as potential CATV penetration and the potential effect on proposed and potential television stations, are not subject to positive proof, our findings and conclusions must rest to some extent *on forecasts and reasonable inferences* from such evidence as is available. That we may properly do so is well-established”

* * * * *

“We appreciate the difficulty that a case of this nature presents . . . , intertwined as it is with important and novel matters of policy which depend somewhat on factors *not capable of ironclad proof*. The hearing process in this case has served a useful purpose”

Surely, what is not subject to “ironclad proof” *after hearing* cannot be expected to be so *before*; and had the Commission, here, also relied upon “forecasts and reasonable inferences,” it would have ordered a hearing for a “useful purpose.” Cf. *Hall v. Federal Communications Commission*, 99 U. S. App. D.C. 86, 93, 237 F.2d 567, 574 (1956).

Elsewhere the Commission, in an apparent effort to avoid the question of impact, states (R. 764) that there is “very little” programming from the local stations which could be adversely affected (paragraph 7(e)) and indicates that there has been a reduction in the local programming by two of the market's

stations (paragraph 8(f)). In point of fact, the more affluent Denver neighbors carry about the same program percentages. Thus, the three stations in Colorado Springs-Pueblo during the composite week, 1966-7, carried: Local, 8%; Recorded, 22%; Network, 70% (R. 493). The Denver affiliates, for the same period, carried Local, 9%; Recorded, 28%; Network, 63% (R. 493).

The Commission's observation that a cutback has been proposed by two of the three stations in this kind of programming refers to the most inconsequential of adjustments — 1 hr., 40 min. by KKTV and 2 hrs., 7 min. by KOAA-TV which obviously "rounded off" the minutes of local programming carried in the past by making its proposed operation in terms of *hours only* (identical to the past) (R. 493-5).

And if the local programming is indeed "very little", why should the Commission, by its action, reduce those amounts still further?

D. Refusal to Consider Concentration of Control. — The Commission seeks to justify its refusal in paragraph 7(i) (R. 764) to deal with the substantial ownership by Vumore of other broadcast facilities, CATV systems and connecting common carriers by the statement that such "is not prohibited by the Commission's Rules" (although we hasten to add that these problems are under active study in Docket 17397 looking toward adoption of rules), and that the Commission "retains adequate authority to deal with the question should action appear desirable". We question whether, as a practical matter, the Commission would turn back the clock and require divestment. *Cf. Community Broadcasting Co. v. Federal Communications Commission*, 107 U. S. App. D.C. 95, 101, 274 F.2d 753, 759 (1960).

The Commission's observation (R. 764) that the cross-ownership here present "is not within the same television market", is certainly not consistent

with the Commission's diversification policies. Indeed, the Commission, having recognized that RKO General already effectively owns its quota of five VHF television stations in the United States,⁴³ is opening up the potential for it to acquire a sixth station — this time operating by wire rather than over the air. With its substantial interests in systems *in this area* and throughout the United States, its plans for program originations and its experience with Pay-TV, the proposal presents serious questions under policies relating to diversification.

E. Pay-TV and Program Originations. — The Commission asserts that Pay-TV is prohibited by the terms of Vumore's franchise. That franchise prohibits Pay-TV on a "per program" basis only (R. 108). We are not quite sure what that means nor did the Commission focus upon its meaning. But the Commission certainly knows that there are numerous forms of "pay-tv" or "subscription tv" and there is nothing to prevent these two groups, with their formidable financial resources and experience in Pay-TV, from purchasing programs, transmitting them over the Colorado Springs system and adjusting rates accordingly. Vumore has not denied any such possibility; in fact, Mr. Daniels has been quoted recently as insisting that the FCC has no authority over program originations. The Commission should at least inform itself as to what *the plans and potentials for such services are*. This is particularly required in light of its continuing study of this problem and the express interest of Congress in the entire subject matter.⁴⁴

⁴³ See *NBC, Inc.*, 21 RR 524 (1961).

⁴⁴ At the present time, the Commission has no rule or regulation concerning program originations, commercial or non-commercial, by CATV systems. In its recent San Diego decision (*Midwest Television, Inc. (KFMB-TV)*, *supra*), the Commission permitted certain CATV systems to originate programming as an experiment (with annual reports to be filed) and on condition that no commercials be originated.

F. Translator Operations. – In paragraph 7(k) the Commission states (R. 764) that potential problems relative to translators are “simply irrelevant”. We do not understand why – if 45 translators now in operation and serving rural and underserved areas by carrying the signals of the Colorado Springs–Pueblo stations should either cease to exist or have their services substantially curtailed – such consequences are “irrelevant”. Moreover, the Commission did not consider the alternative possibility that, instead of CATV, translator services could be utilized to bring more service to Colorado Springs–Pueblo and their rural environs until the local facilities are activated.

G. Absence of Affirmative Findings in Support of the Action Here Challenged. – Finally, in the face of the specific and detailed showing as to injuries which would be visited upon the public by Vumore’s proposed operation, neither the record below nor the Commission decision reflects any countervailing benefits. The Coe-Saunders Report demonstrated that 90% of the programming which would be made available from the Denver affiliated stations (excluding local newscasts and feature films) is available through the Colorado Springs–Pueblo facilities – although not necessarily broadcast on the same day, so that the non-duplication rule is not effective to provide protection (R. 497-9). Thus, the Vumore proposal will not provide any significant diversity of programming to the people in Colorado Springs, and the Commission itself expressly so found: “We agree that the possible programming diversity promised by the CATV would not, by itself, justify the installation of the CATV system” (R. 764).

Neither does the record reflect – nor did the Commission find – any other affirmative public interest reasons why the proposed CATV service was needed in Colorado Springs–Pueblo. Thus, the record contains uncontradicted and specific demonstrations of injury to the local stations and to the utilization

of the 3 UHF channels allocated to that market. The record also presents substantial questions under the Commission's mass media diversification policies, particularly underscored by Vumore's extensive broadcast and CATV interests and RKO's connection with Pay-TV. Against these detriments, and those which petitioners would suffer, there neither exists in the record, nor are there any findings in the decision, of compensating public interest benefits.

The similarity between the inevitable consequences of the Vumore proposal to the public and those arising under the *Carroll* doctrine⁴⁵ are worth noting. If, under *Carroll*, substantial public interest questions arise from the authorization of a new *broadcast* facility (offering *free* service to *all* the public), because that authorization may affect the ability of one or more local stations to continue to operate and program in the public interest, surely it follows that the authorization of a 10-channel CATV service with even greater potential adverse effects upon broadcast facilities (but *not being free* and *not being available to all* the public) raises *a fortiori* similar and substantial public interest questions. And where substantial public interest questions are raised, involving disputed matters, a hearing is essential.

Even if the Commission may require *substantial showings* in *Carroll*,⁴⁶ and because of additional administrative problems peculiar to CATV even more detailed showings, the question remains: *What are these requirements?* If the test is neither that of *Federal* nor *Carroll*, the Commission fails to say *what is necessary in order to bring to the Commission's attention public interest questions relative to the country's smaller television markets.*

⁴⁵ *Carroll Broadcasting Co. v. FCC*, 103 U. S. App. D. C. 346, 258 F.2d 440 (1958).

⁴⁶ See *KGMO Radio-Television, Inc. v. FCC*, 119 U. S. App. D. C. 1, 336 F.2d 920 (1964); but see also, *Southwestern Operating Company v. FCC*, 122 U. S. App. D. C. 137, 351 F.2d 834 (1965).

Despite the admonitions of this Court, then,⁴⁷ the Commission has persisted in the face of the substantial evidence presented to it in this record, in simplistic dispositions of cases as they come up, saying only: "This is enough" (when it waives the evidentiary hearing requirement of Rule 74.1107) or "this is not enough" when it denies requests for evidentiary hearings in the smaller markets. Such an approach deprives this Court of any opportunity to review effectively the actions taken by the agency. See *West Michigan Telecasters, Inc. v. FCC*, *supra*.

We think that this Court must hold, under any reasonable test of the public interest, that these petitioners made a showing which compelled the Commission either to hold an evidentiary hearing, or, certainly, to explain in far more detail than it did why such a hearing was unnecessary.

⁴⁷ See *Channel 9 Syracuse, Inc. v. FCC*, *supra*, and *Hubbard Broadcasting Company v. FCC*, *supra*.

of the 3 UHF channels allocated to that market. The record also presents substantial questions under the Commission's mass media diversification policies, particularly underscored by Vumore's extensive broadcast and CATV interests and RKO's connection with Pay-TV. Against these detriments, and those which petitioners would suffer, there neither exists in the record, nor are there any findings in the decision, of compensating public interest benefits.

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⁴⁷ See *Channel 9 Syracuse, Inc. v. FCC, supra*, and *Hubbard Broadcasting Company v. FCC, supra*.

CONCLUSION

In light of the foregoing, it is respectfully requested that the Court reverse the Commission decision and order further proceedings adequate to dispose of the public interest questions presented.

Respectfully submitted,

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July 16, 1968



APPENDIX A

RULES 74.1105, 74.1107 and 74.1109 of the FEDERAL COMMUNICATIONS COMMISSION

“§74.1105 Notification prior to the commencement of new service. —

(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under §73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and state educational television agencies, if any.

“(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

“(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to §74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission’s ruling on the petition or on the interlocutory question of temporary relief pending further procedures; provided, however, that service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of §74.1107 of this chapter. Where no petition pursuant to §74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of §74.1107.

“(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

“§74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures. — (a) No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing

circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

“(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, the date on which copies of the notifications required by §74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

“(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under §74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

“(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section: and provided further, that no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under §74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, paragraphs 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

“(e) Within 60 days of issuance of a request filed pursuant to paragraph (a) of this section, interested parties seeking simultaneous consideration with such request must file appropriate requests for any other CATV system in the same television market. All requests for CATV systems in a given market

timely filed with respect to the first request will be processed and considered simultaneously. Later filed requests for the particular market will be subject to chronological processing and may not be considered in the same proceeding as the earlier requests.

“§74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes. – (a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

“(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant or other interested person who may be directly affected if the relief requested in the petition should be granted.

“(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

“(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

"(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

"(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

"(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of §74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

“(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of §74.1107(d) of this chapter, opposition to such requests for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

“(h) Where a petition for waiver of the provisions of §74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission’s ruling on the petition or on the interlocutory question of temporary relief pending further procedures.”

BRIEF FOR INTERVENOR
PUEBLO TV POWER, INC.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Received AUG 1 1968
No. 22,024

Nathan J. Paulson
CLERK

METROPOLITAN TELEVISION COMPANY,
SANGRE de CRISTO BROADCASTING CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents,

THE CITY OF COLORADO SPRINGS, COLORADO, *et al.*,
Intervenors.

On Petition for Review of
Memorandum Opinion and Order of
The Federal Communications Commission

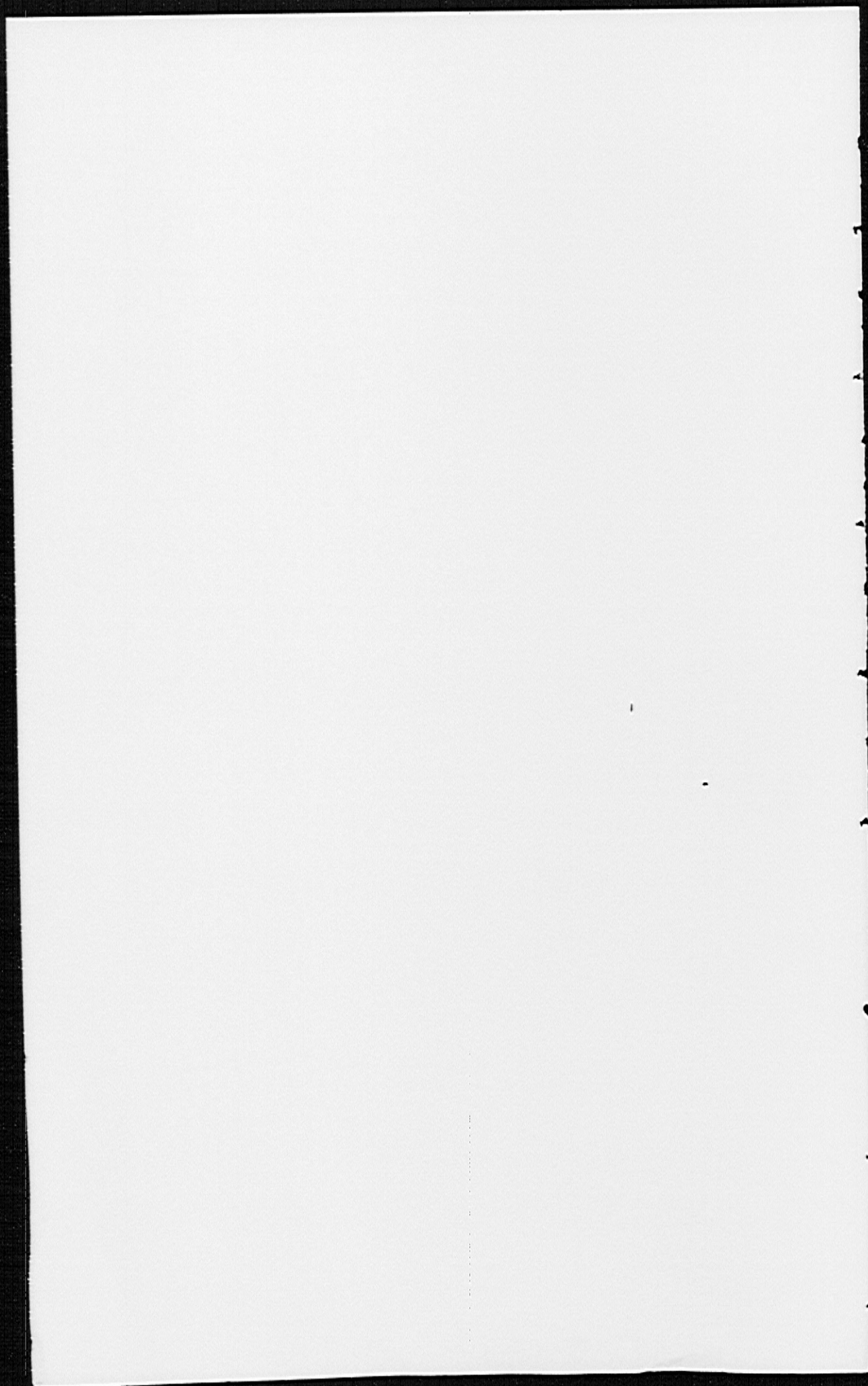
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<i>Second Report and Order of the Federal Communications Commission on Community Antenna Television,</i> F.C.C. 66-620, released March 8, 1966, 2 F.C.C. 2d 725, 31 Fed. Reg. 4540, 6 Pike and Fischer Radio Regulation, 2d Series 1717	2, 3, 6, 12, 13, 18
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<i>Memorandum Opinion and Order,</i> F.C.C. 67-34, in Dockets 14895, <i>et al.</i> , and Rule Makings 1017, <i>et al.</i> , released January 19, 1967, 8 RR 2d 1677	3, 18

* Relevant cases chiefly relied upon.



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,024

METROPOLITAN TELEVISION COMPANY,
SANGRE de CRISTO BROADCASTING CORPORATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents,

THE CITY OF COLORADO SPRINGS, COLORADO, *et al.*,

Intervenors.

On Petition for Review of
Memorandum Opinion and Order of
The Federal Communications Commission

**BRIEF FOR INTERVENOR
PUEBLO TV POWER, INC.**

STATEMENT OF ISSUES*

The Intervenor, Pueblo TV Power, Inc., adopts the Statement of Question Presented as set forth in the Brief of Petitioner, Pikes Peak Broadcasting Company, Case No. 22,023.

* The case in issue has not been previously before this Court.

STATEMENT OF THE CASE

Intervenor, Pueblo TV Power, Inc., submits that the Statement of the Case as set forth by Petitioners herein is argumentative and supports adoption by this Court of the Statement of the Case as set forth in the Brief of Respondents filed this date. For the information of the Court, Pueblo TV Power, Inc., desires to submit additional information concerning its limited interest in this case.

This case involves judicial review of a Commission *Memorandum Opinion and Order*, FCC 68-393, in SR-973, as released May 24, 1968, in which the Commission declined to accede to Petitioners' requests for imposition of extraordinary sanctions against Vumore Video Corporation of Colorado, Inc.; the latter after lengthy proceedings held by and before the City Council of Colorado Springs, Colorado, was authorized to construct and operate a CATV system in that city.¹

Before the Commission, Petitioners herein asserted that economic injury affecting the public interest would be caused to Television Station KOAA-TV, Pueblo, Colorado – unless the Commission initiated special proceedings to limit carriage of signals of Denver television

¹ In its *Second Report and Order*, the Commission did not assert the right to issue franchises for CATV operators. Franchising is a function performed by the municipalities. See *Second Report and Order*, FCC 66-220, 6 RR 2d 1717, 2 FCC 2d 725, 31 Fed. Reg. 4540, as released on March 8, 1966, at para. 101. See also, *Notice of Inquiry and Notice of Proposed Rule Making*, FCC 65-335, 4 RR 2d 1679, 1 FCC 2d 453, 30 Fed. Reg. 6078, as released April 23, 1965, all at para. 32.

stations on Vumore's Colorado Springs CATV authorization.²

Subsequent to the issuance of Vumore's CATV authorization by the City of Colorado Springs and after completion of lengthy proceedings by and before the City Council of Pueblo, Pueblo TV Power, Inc., a Colorado corporation, received a permit to construct and operate a CATV system in Pueblo, Colorado. Pikes Peak Broadcasting Company, Metropolitan Television Company and Sangre de Cristo Broadcasting Corporation (hereinafter "Petitioners") requested Commission imposition of extraordinary sanctions against Pueblo TV Power's authorization through initiation of proceedings which would limit carriage of Denver television signals by Pueblo TV Power on its Pueblo authorization. Further, Petitioners requested that the Commission consolidate in one proceeding their separate requests for imposition of extraordinary sanctions against Vumore and Pueblo TV Power, Inc.

In the *Memorandum Opinion and Order*³ under review in this case, the Commission declined to consolidate Petitioners' separate requests for special relief against the Colorado Springs and Pueblo CATV authorizations, and, after consideration of all of Petitioners' presentation (including an economic study hereinafter referred to as the

² In its *Second Report and Order*, the Commission held that absent a special showing made pursuant to Section 74.1109 of its Rules, there is no need for prior evidentiary hearing before CATV service may be instituted in television markets below the top 100. Neither Colorado Springs nor Pueblo, nor both of them collectively, are within the top 100 markets. See *Second Report and Order*, fn. 1, at paras. 144, 145 & 146. See also, *Memorandum Opinion and Order*, in Dockets 14895, et al., 8 RR 2d 1677, 1689, para. 25 (1967).

³ See *Memorandum Opinion and Order*, FCC 68-393, in SR-973, as released May 24, 1968.

Coe-Saunders Report), held that the showing of impact adverse to the public interest was insufficient to warrant imposition of the extraordinary relief requested by Petitioners.

It is important to note that (1) Colorado Springs, Colorado is *not* within the so-called top 100 markets, (2) Pueblo is not within same, (3) the Colorado Springs - Pueblo markets combined do not fall within the said top 100 markets, (4) the residents of those cities want CATV,⁴ (5) many citizens gave their support of CATV at the City Council hearings in both cities, (6) at one time or another, all *three local television stations (two of whom are Petitioners in this case), directly or indirectly, were applicants for CATV systems in both Colorado Springs and Pueblo and proposed the very CATV service to which they now so strenuously object,*⁵ and (7) since Petitioners herein were not given the CATV permits in either Colorado Springs or Pueblo, they now seek to obtain Court prohibition of said CATV service. Petitioners now aver that the public interest, or their view of it, has changed; Pueblo TV Power respectfully submits that the only thing that has changed is the chair in which the Petitioners sit.

⁴ See Petitions of Residents, letters from residents, and city officials, etc., in FCC proceedings SR-36822 and SR-973.

⁵ For example, the CATV applicants, in Pueblo, included:

(a) *Southern Colorado Cablevision, Inc.*: owned equally by *Pikes Peak Broadcasting Company* (KRDO-TV, Colorado Springs), *Garvey Communications* (KKTU, Colorado Springs), *Time-Life, Inc.* and *Westland Theatres*. See application of *Southern Colorado Cablevision, Inc.*, on file with City Council of Colorado Springs and City Council of Pueblo. Due to a widely-publicized conflict of interest as Mayor of Colorado Springs and President of *Southern Colorado Cablevision* (CATV applicant in Colorado Springs

(Continued)

Petitioners assert, to this Court, that the Commission committed reversible error by (1) refusing to grant their requests for extraordinary relief and designation for hearing of Vumore's Colorado Springs CATV authorization and (2) declining to consolidate the separate proceedings involving the Colorado Springs and Pueblo CATV authorizations.

The Petitioners' requests for special relief against the CATV authorization of Pueblo TV Power, Inc., are still pending before the Commission. Pueblo TV Power, Inc., has caused to have prepared an economic study which refutes the methodology and conclusions of Petitioners' Coe-Saunders Report.⁶ Pueblo TV Power, Inc., has

(Footnote continued from preceding page)

and Pueblo), Mayor Hoth of Pikes Peak (KRDO-TV), eventually sold his CATV stock.

(b) *Pueblo Vumore, Inc.*: owned by a subsidiary, RKO-General, and several Pueblos, including *William M. White, Jr.* The latter is a holder of approximately 20% of the stock of *Sangre de Cristo Broadcasting Corporation*, a Petitioner herein. The FCC has granted Sangre de Cristo's application to acquire KOAA-TV, Pueblo, for \$1.5 million. After losing his quest for Pueblo CATV, White withdrew from Pueblo Vumore in January 1968 and prepared to fight area CATV. For examples of White's once intense advocacy of CATV in Pueblo, see Appendices A, B, C & D hereof — letters from White to Vumore's President.

Thus, at one time or another, all three local television stations, directly or indirectly, were applicants for, proponents of, and believers in, CATV and its public service — in Pueblo, Colorado Springs and other Colorado cities. In equity, a strong case could be made that KOAA and KRDO, by their past actions, have waived their right to object.

⁶ On May 1, 1968, Pueblo TV Power filed with the Commission, a prolific economic rebuttal of the methodology and conclusions of the Coe-Saunders Report. The rebuttal study was available to the Commission three weeks before the May 24, 1968, *Memorandum Opinion and Order*, the subject of this appeal.

requested intervention herein, for its interests could be adversely affected.⁷

SUMMARY OF ARGUMENT

The Supreme Court of the United States has recently upheld the jurisdiction of the Federal Communications Commission to issue regulations which will provide for orderly growth of the community antenna television industry in a manner consistent with the public interest.⁸ The Supreme Court found that this is a logical extension of activities of the Commission and reaffirms a well-established principle, supported by statute, legislative history, and Court precedent, that the Commission is and should be entrusted with flexible means to assure that the dynamic communications industry can be regulated through use of administrative expertise in such a manner as to provide optimum service in the public interest.

Petitioners, in effect, herein launch an untimely, collateral attack upon the carefully enunciated principles of the Commission's *Second Report and Order*,⁹ petitioners both implicitly and explicitly complain that,

⁷ See, for example, *Memorandum Opinion and Order*, para. 3, which states, in pertinent part, as follows:

"... We note, however, the many of the parties participating in the Colorado Springs controversy, and much of the information submitted concerning ARB-138 may apply equally to both cities; therefore, we have taken into account the prospect of CATV in Pueblo and — to the extent possible — the potential impact in both communities."

⁸ See *United States v. Southwestern Cable Co., et al.*, ____ U. S. ____ (Nos. 363 and 428, June 10, 1968), 13 RR 2d 2045.

⁹ *Ibid.*, fn. 1.

under the Commission's Rules, (1) an automatic hearing is afforded to television stations objecting to importation of "distant signals" into the top 100 markets of the United States,¹⁰ whereas, (2) a television station in a market below the top 100 is not entitled to automatic hearing but, rather, is required by Commission Rules to make a special showing warranting evidentiary hearing or the imposition of extraordinary Commission sanction.¹¹ Further, Petitioners herein complain that the Commission refused to consolidate the Vumore authorization for Colorado Springs with that of Intervenor, Pueblo TV Power's authorization in Pueblo. It is axiomatic that administrative agencies are accorded wide discretion in exercising their statutorily delegated functions. The Courts properly give great deference to administrative expertise. This is true even where the Court may disagree with the wisdom of a policy decision by an administrative agency exercising functions entrusted to it under statute and decision. The Court cannot substitute its discretion for that of an administrative agency.

Concededly, administrative agencies have been reversed by the Courts where decisions are arbitrary or capricious. Such is not the case here. If anything, the Commission has been forbearing in considering the merits of presentations made untimely or in a manner not contemplated by the Commission Rules.¹² The Commission considered all of the presentations made by Petitioners herein even though

¹⁰ See 47 CFR 74.1107.

¹¹ See 47 CFR 74.1109. See also, fn. 2, *supra*.

¹² See *Memorandum Opinion and Order*, fn. 3, *supra*, at para. 5.

it was not required to do so and still rejected the merits of the arguments espoused therein.¹³

A reversal of the Commission, by this Court, will establish a dangerous and burdensome precedent; that is, whenever a broadcaster files a ponderous, prodigious economic study — the lack of logical analyses, methodology and conclusions notwithstanding — the Commission will be required to designate the case for hearing, automatically.

ARGUMENT

The Federal Communications Commission is an administrative agency established by Congress to determine, under statutory direction, the rights of the people of the United States to have the best possible radio service. *Black River Valley Broadcasters v. McNinch*, 69 App. D. C. 311, 101 F.2d 235 (1939), *cert. denied*, 307 U. S. 623, 59 S. Ct. 793, 83 L. Ed. 1501; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134 (1938); *Federal Radio Commission v. Nelson Brothers Company*, 289 U. S. 266 (1931). Congress long ago determined that national regulation is essential to the efficient use of radio facilities and created the Commission to provide a unified and comprehensive regulatory system for the broadcasting industry. *FCC v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137 (1940).

¹³ *Ibid.*, fn. 3 at paras. 5-8. In particular, in para. 8, the Commission stated:

"We have *carefully considered this filing*, but do not feel that it is sufficiently supported to justify a hearing."
(Emphasis supplied.)

On June 10, 1968, in the case of *United States, et al. v. Southwestern Cable Co.*,¹⁴ the Supreme Court of the United States decided that the Commission had ample authority to assert jurisdiction over the community antenna television industry. In deciding that this assertion is a logical extension of Commission authority, the Supreme Court held as follows:

"The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to 'all interstate and foreign communication by wire or radio . . . ' 47 U.S.C. Section 152(a). The Commission's responsibilities are no more narrow: It is required to endeavor to 'make available . . . to all the people of the United States a rapid, efficient Nation-wide and world-wide wire and radio communication service . . . ' 47 U.S.C. Section 151. The Commission was expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory authority over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.' It was for this purpose given 'broad authority.' As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress 'formulated a unified and comprehensive regulatory system for the (broadcasting) industry.' *FCC v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137."¹⁵

¹⁴ *Ibid.*, fn. 8.

¹⁵ *Ibid.*, fn. 8 at pages 9-10. Footnotes omitted.

Further, in rejecting arguments of the Respondents in the *Southwestern Cable* case, the Supreme Court took a rather expansive view of the Commission's authority to deal with the burgeoning CATV industry; note the following language (Slip Opinion, pages 14-15):

"We cannot construe the Act so restrictively. Nothing in the language of Section 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The Section itself states merely that the 'provisions of [the Act] shall apply to all interstate and foreign communication by wire and radio . . .'. Similarly, the legislative history indicates that the Commission was given 'regulatory power over all forms of electrical communication . . .'. S. Rep. No. 830, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' *FCC v. Pottsville Broadcasting Co.*, *supra*, at 138, that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.' Thus, '[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.' *FCC v. Pottsville Broadcasting Co.*, *supra*, at 138. Congress in 1934 acted in a field that was demonstrably 'both new and dynamic,' and it

therefore gave the Commission 'a comprehensive mandate,' with 'not niggardly but expansive powers.' *National Broadcasting Co. v. United States*, 319 U. S. 190, 219. We have found no reason to believe that Section 152 does not, as its terms suggest, confer regulatory authority over 'all interstate . . . communication by wire or radio.'" (Footnotes omitted.)

The foregoing conclusively demonstrates that the Commission has been accorded wide discretionary power over the dynamic communications industry by the Congress and by Court decision. The Commission's statutory powers are not restrictively construed by reviewing authority, a precept of great importance in consideration of the action under review in this case.

The Petitioners have complained that the Commission erred reversibly in failing to accede to the requests of the Petitioners for extraordinary relief against importation of distant city signals into cities which neither collectively nor individually come within the top 100 television markets of the United States. However, Section 74.1107 of the Commission Rules and Regulations¹⁶ prescribes automatic hearing in situations where a CATV operator proposes to carry "distant city" television signals to areas within the top 100 television markets of the United States. Section 74.1109 of the Commission Rules and Regulations¹⁷ provides that a television station, in an area below the top 100 television markets, has the burden of proof of showing that special relief is warranted against importation of distant television signals.

¹⁶ See 47 CFR 74.1107.

¹⁷ See 47 CFR 74.1109.

Sections 74.1107 and 74.1109, *supra*, were promulgated by the Commission after lengthy rulemaking proceedings held in conjunction with issuance of the *Second Report and Order*¹⁸ on community antenna television; in the latter proceeding the Commission considered the voluminous comments of broadcasters, community antenna television industry representatives, translator industry representatives, and myriad other parties. Petitioners herein, in effect, make attack upon the *Second Report and Order*.¹⁸ It must be rejected as untimely and improper.¹⁹

The *Second Report and Order* was adopted after rule making proceedings conducted in accordance with the Administrative Procedure Act. Agency rules, including Commission Rules 74.1107 and 74.1109, have the force of law and will be given full effect by the Courts. *National Broadcasting Company v. United States*, 319 U. S. 190, 63 S. Ct. 997, 87 L. Ed. 1344 (1943); *Rosen v. United States*, 245 U. S. 467, 38 S. Ct. 148, 62 L. Ed. 406 (1918); *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538 (1879); *Gratiot v. United States*, 4 How. 80, 45 U. S. 80, 11 L. Ed. 884 (1846); *United States v. Short*, 240 F.2d 292 (C.A. Cal., 1957); *Interstate Motor Lines v. Great Western Railway Co.*, 161 F.2d 968 (C.A. Colo., 1947); *Hotch v. United States*, 212 F.2d 280 (C.A. Alaska, 1954). The Commission here has done nothing but enforce its *existing* rules. Sections 74.1107 and 74.1109 neither require nor guarantee a hearing in CATV cases involving markets below the top 100. Under 74.1109, Petitioners are given an opportunity to seek special relief. Therein, they must provide facts sufficient to "demonstrate the need for relief." See 47 CFR 74.1109. In the

¹⁸ *Ibid.*, fn. 1.

¹⁹ *Ibid.*, fn. 9. Petitioners should not be permitted to use Section 74.1109 for rule making purposes. See *Reeves Broadcasting Corporation*, 10 RR 2d 259 (1967).

instant case, they failed to do so. They failed and rely solely upon the Coe-Saunders Report. As the Commission's *Memorandum Opinion and Order* reflects, it fails to make its case. If this Court decides otherwise, this case will serve as precedent to *force* the Commission to overload its hearing docket by granting *every* 74.1109 request supported by a ponderous "economic study." Such analyses are peculiarly within the expertise of the administrative agency.

Petitioners rely upon *Interstate Broadcasting Company*, *Carroll Broadcasting Company*, *Federal Broadcasting System*, *Hall v. Federal Communications Commission*, and other unrelated cases, in urging reversal of the Commission by this Court. Manifestly, Petitioners have overlooked the fact that the *Interstate* and other cases involved judicial review of Commission decisions applying completely different statutory criteria. The *Interstate* and other cases relate to specific statutory mandates which the Commission is obliged to follow in regulation of broadcasting activities. See, for example, the specific statutory directive of Section 309(c) of the Communications Act of 1934, as amended. However, Congress has enunciated no such specific guidelines in the CATV field, and in the absence of specific Congressional directive the Commission Rules, adopted pursuant to the *Second Report and Order*, have the force and effect of law. See *National Broadcasting Company*, *Rosen*, *Reed*, et al., *supra*.

In the case at bar, the Commission has considered but has rejected legal and factual presentations tending to support allegations that there would be economic injury to Petitioners in the event of establishment of a CATV system which would import television signals from Denver. The public interest is the touchstone of the Communications Act; hence, it is, of course, only economic injury affecting the public interest which is cognizable by

the Commission in exercising its powers. See *Federal Communications Commission v. Pottsville Broadcasting*, *supra*. After consideration of each legal and factual argument espoused by the Petitioners, the Commission has concluded that the Petitioners did not satisfy the requirement in Rule 74.1109 of substantiating injury to the public in a manner sufficient to warrant special relief. An administrative agency's findings, on a question within its specialty, are not to be disturbed except on the plainest case applied with especial force when the findings are necessarily prospective. Learned Hand, J., for a three-Judge Court in *National Broadcasting Company v. United States*, 47 F. Supp. 940, 946, *affirmed*, 319 U. S. 190, 63 S. Ct. 997, 87 L. Ed. 1344 (1943). The law does not require that an evidentiary hearing be held before the Commission can make such findings. See *National Broadcasting Company v. United States*, *supra*; *Yankee Network v. Federal Communications Commission*, 71 App. D. C. 171, 107 F.2d 212 (1940).

In effect, Petitioners ask this Court to substitute its discretion for that of an administrative agency. This the Courts have declined to do even where the record is susceptible to other conclusions than those drawn by the Commission, or where the Court might have arrived at other conclusions in regard to public interest questions. See *Yankee Network*, *supra*; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145, 146, 59 S. Ct. 754, 764, 83 L. Ed. 1147 (1948); *Mississippi Valley Barge Line Co., v. United States*, 292 U. S. 282, 286, 287, 54 S. Ct. 692, 78 L. Ed. 1260 (1933); *Greenwich Broadcasting Corp. v. Federal Communications Commission*, 111 U. S. App. D. C. 129, 294 F.2d 913 (1961); *Lorain Journal v. Federal Communications Commission*, 122 U. S. App. D. C. 127, 351 F.2d 824 (1965); *Eastern Airlines v. Civil Aeronautics Board*, 271 F.2d 752 (C.A. 2) (1959), *cert. denied*, 362 U. S. 790, 80 S. Ct. 954, 4 L. Ed. 2d 901 (1960); *Western Airlines v. Civil Aeronautics Board*, 97 U. S. App.

D. C. 42, 228 F.2d 13 (1955); *Gordon v. Freeman*, 256 F. Supp. 592 (D.C. N.J., 1966), *affirmed*, 369 F.2d 404, *cert. denied*, 386 U. S. 392, 87 S. Ct. 1307, 18 L. Ed. 2d 337 (1967); *James S. Rivers v. Federal Communications Commission*, 122 U. S. App. D. C. 29, 351 F.2d 194 (1965); and *KWK Radio v. Federal Communications Commission*, 119 U. S. App. D. C. 144, 337 F.2d 540 (1964).

Similarly, Petitioners are requesting this Court to substitute its own view of what should be done with particular reference to competitive considerations which are properly committed to the jurisdiction and discretion of an administrative agency. See *City of Galveston v. United States* 257 F. Supp. 243 (D. C. Texas, 1966), *affirmed*, 386 U. S. 269, 87 S. Ct. 1018, 18 L. Ed. 2d 38 (1967). The Courts are not empowered to weigh the wisdom of a particular administrative decision. See *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 54 S. Ct. 558, 78 L. Ed. 1260 (1934); *United States v. Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 536, 66 S. Ct. 687, 698 L. Ed. 821 (1946). The *Federal Communications Commission v. Pottsville Broadcasting Co.*, *supra*; *National Broadcasting Company v. United States*, *supra*; and *American Power and Light Company v. Securities and Exchange Commission*, 329 U. S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946).

With reference to the refusal of the Commission to consolidate the Vumore and Pueblo TV Power proceedings, this Court has recently held that such procedural matters are addressed to the discretion of the agency and are not a proper concern for the Courts. See *City of San Antonio v. Civil Aeronautics Board*, 126 U. S. App. D. C. 112, 374 F.2d 326 (1967). This is in keeping with a holding of the Supreme Court in the case of *Federal Communications Commission v. Pottsville Broadcasting*, where the Court said, in pertinent part, as follows (at 309 U. S. 134, 138):

"Necessarily, therefore, *the subordinate questions of procedure* in ascertaining public interest, when the Commission's licensing power is invoked, the scope of inquiry, whether applications should be heard contemporaneously or successively, whether parties should be permitted to intervene in one another's proceedings, and similar questions *were explicitly and by implication left to the Commission's own devising* so long of course as it preserves the basic requirements designed for protection of private as well as public interest." (Emphases supplied.)

See also, *Ward v. Federal Communications Commission*, 71 App. D. C. 166, 108 F.2d 486 (1940); *Bethesda-Chevy Chase Broadcasters v. Federal Communications Commission*, ___ U.S.App.D.C. ___, 385 F.2d 967 (1967).

To prevail here, Petitioners must show that the Commission was arbitrary and capricious. See *Booth American v. Federal Communications Commission*, 126 U. S. App. D. C. 97, ___ F.2d ___ (1967); *KWK Radio, supra*; *James S. Rivers, supra*; *Greenwich Broadcasting, supra*. In earlier cases involving application of its CATV rules, the Commission has been affirmed by this Court where the result reached was reasonable, even where the Court expressed reservation about Commission substantiation for the result reached. See *Channel 9 Syracuse v. Federal Communications Commission*, ___ U. S. App. D. C. ___, 385 F.2d 969 (1967); *Hubbard Broadcasting v. Federal Communications Commission*, ___ U. S. App. D. C. ___, 385 F.2d 979 (1967); *Cedar Rapids Television v. Federal Communications Commission*, ___ U. S. App. D. C. ___, 387 F.2d 228 (1967). The Commission decision has not been shown to be arbitrary or capricious.

If anything, the Commission has been more than forbearing in considering demerits of Petitioners' presentation. Petitioners in this case freely concede their untimeliness —

by more than six months — in requesting special relief from the Commission. Bearing in mind that the Commission Rules have the force and effect of law, the Commission would have been perfectly justified in refusing to consider these untimely objections. See *Springfield Television Broadcasting Co. v. Federal Communications Commission*, 117 U. S. App. D. C. 214, 328 F.2d 186 (1963). The Supreme Court has held that administrative agency decisions should be reversed only where objection is made at the agency at the time appropriate under its rules of practice. See *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 333, 73 S. Ct. 67, 97 L. Ed. 54 (1952). The Commission was more than fair and equitable in considering, on the merits, arguments of Petitioners which were not authorized by the Commission Rules

This appeal should not be decided on questions not properly before this Court. Petitioners allege or infer that (1) Vumore Video Corporation of Colorado, Inc. ("Vumore") will import signals from Los Angeles and San Francisco, (2) build a 20-channel CATV system, (3) offer Pay-TV, (4) create monopoly by CATV, (5) carry TV signals from northern Colorado and elsewhere on their CATV systems and the like. The Commission did not pass upon any such proposals and they are not subject to judicial review. It would be helpful to set forth what proposal is at issue here: (1) in *this* proceeding Vumore proposes to carry eight television stations — 5 from Denver and 3 from Colorado Springs — Pueblo; any attempt to carry California TV's or any other distant signals, under Section 74.1105 (47 CFR 74.1105), will be the subject of a *separate proceeding*; (2) nearly every CATV system currently under construction in the nation today has "20-channel capacity," but this does not mean that 20 channels of TV will ever be offered; Vumore now proposes 8 channels of TV — not 20; any addition of TV channels would be the subject of a separate proceeding before the Commission; (3) Vumore has not proposed Pay-TV; if it does so, or attempts

to carry same, such would be the subject of a separate proceeding before the Commission; (4) since CATV has not shown any tendency to control public opinion, the issue of monopoly is inapposite, and, in the unlikely event that it becomes a problem, would be the subject of a separate proceeding by the Commission; (5) carriage of distant UHF TV stations, not yet licensed or applied for, from Colorado or elsewhere, would be the subject of a separate proceeding before the Commission.

More saliently, Petitioners' appeal herein collaterally attacks the *Second Report and Order*, *supra*, and Rule 74.1107 in particular. The latter requires evidentiary hearing before distant television signals are imported into the so-called top 100 markets. Petitioners, however, via this appeal, would change Rule 74.1107 from "top 100 markets" to "all markets." This Court is not the proper forum to resolve rule making questions peculiarly within the Commission's prerogatives. When the Commission invited comments on such matters,²⁰ Petitioners did not deem it necessary to participate — nor did they ever attempt to initiate an appropriate rule making proceeding.

The Commission decision at issue is based upon supportable findings in an area of expertise expressly committed to administrative discretion. The result reached is reasonable and is consistent with applicable statute, rule and Court precedent. The burden of showing that the Commission was arbitrary and capricious is a heavy one and

²⁰ See *Notice of Inquiry and Proposed Rule Making*, fn. 1; *Memorandum Opinion and Order*, in Dockets 14895, *et al.*, 8 RR 2d 1677, 1688-1690, refusing to broaden the top 100 market rule to "all markets."

has not been carried by Petitioners. The Commission should be affirmed.

Respectfully submitted,

LEE G. LOVETT

JOSEPH F. HENNESSEY

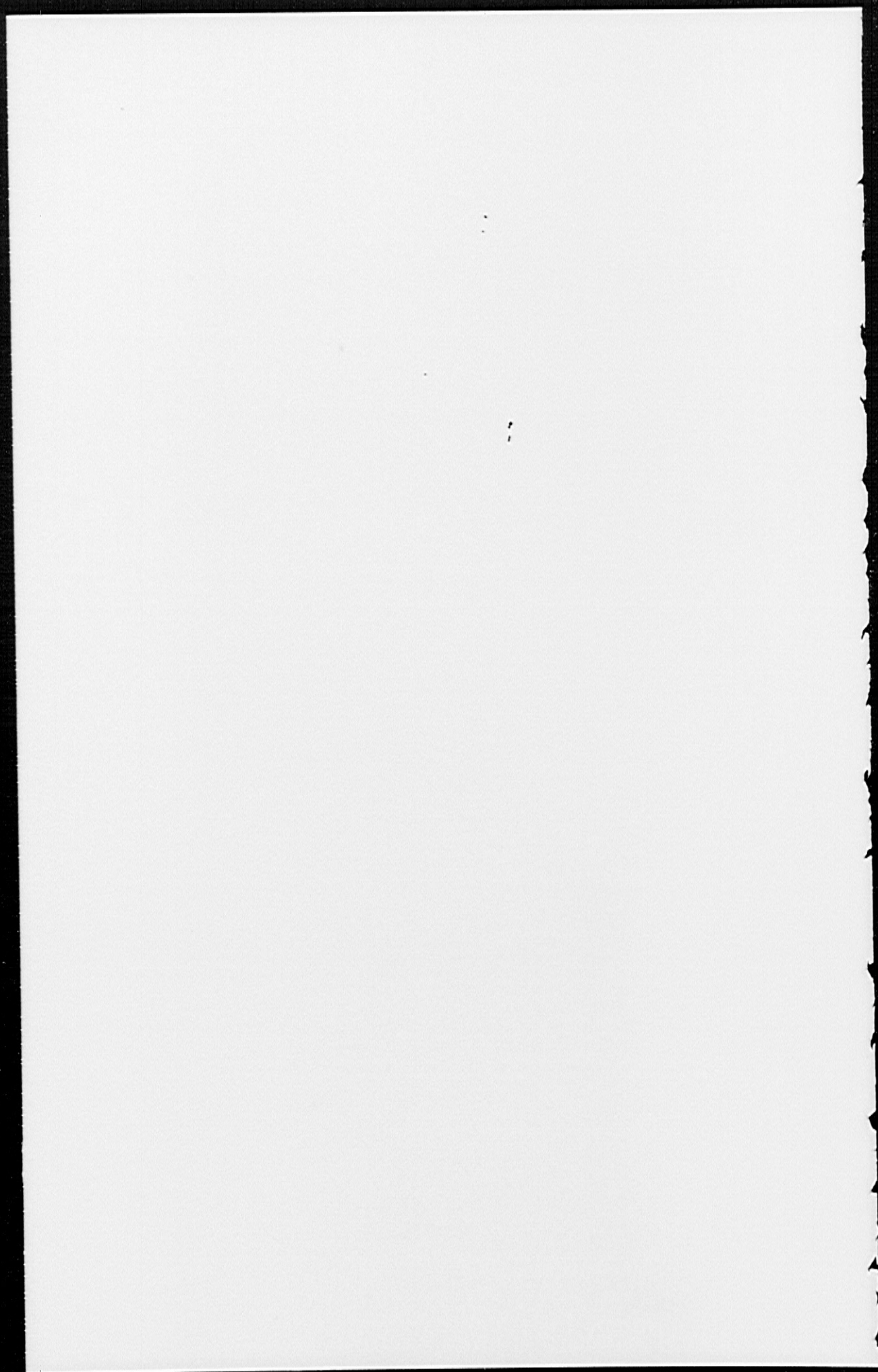
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Attorneys for
Pueblo TV Power, Inc.

Of Counsel:

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Liebman, Williams, Bennett,
Baird & Minow
208 South LaSalle Street
Chicago, Illinois 60604

July 29, 1968



APPENDIX A

DANIELS & ASSOCIATES, INC.

2200 EAST THIRD AVENUE
DENVER, COLORADO 80202
303 533-0000

bill daniels

February 27, 1968

Mr. Tom Farley
Attorney at Law
Bon Durant Building
Pueblo, Colorado

Dear Tom:

As you know, Bill White owned 29% of the Pueblo-Vumore Company. As you also know, the White family has purchased the Pueblo television station. You can see that Bill White's letter was sent to me on January 11, proving that he was an active part of our application (and so stated to the City Council) during the time the permit competition was going on.

For future use before the FCC, I thought you would like to have the benefit of the attached for whatever use it might serve you in the future.

Best regards,



Bill Daniels

mjk

APPENDIX B

WILLIAM M. WHITE, JR.
80 BROAD STREET
NEW YORK, N. Y. 10004

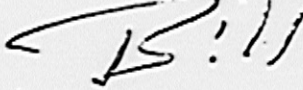
January 23, 1967

Mr. Bill Daniels
Daniels Enterprises
2930 East Third Avenue
Denver, Colorado 80206

Dear Bill:

I enclose herewith my personal check for \$400. It is a great pleasure to be included as a partner in Pueblo Vumore, Inc., particularly given the most desirable local group that is involved in the project. I look forward to the day when we can all celebrate the attainment of real value.

Best personal regards,



William M. White, Jr.

WMM/cc
encl.

APPENDIX C

WILLIAM M. WHITE, JR.

30 BROAD STREET
NEW YORK, N. Y. 10004

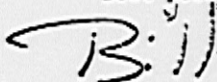
June 6, 1967

Mr. Bill Daniels
Daniels Enterprises
2930 East Third Avenue
Denver, Colorado 80206

Dear Bill:

I would indeed like to continue my participation in the Pueblo project. My accountant tells me that you have my check for \$200. Let's get the franchise and put up some more money. I continue to hope that this will be only the first of many mutual investments.

Best personal regards,



William M. White, Jr.

WMA/cc

APPENDIX D

WILLIAM M. WHITE, JR.
42 BROADWAY
NEW YORK, N. Y. 10004

January 11, 1968

Mr. Bill Daniels
Daniels & Associates, Inc.
2930 East Third Avenue
Denver 6, Colorado

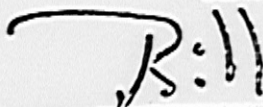
Dear Bill:

Since acquiring my interest in Pueblo Vumore, I have had occasion to learn more about the respective roles of free broadcasting and CMTV. While I continue to believe that CMTV has a proper function in some areas, I now realize that where it is used to import distant signals into communities like Pueblo and Colorado Springs, it can damage the free system, with resulting loss to those members of the public who cannot afford to pay for the CMTV service or who are located in areas not reached by CMTV.

Under these circumstances, I think it best that I withdraw from Pueblo Vumore. Accordingly, please cancel my stock subscription or forward to me a stock certificate so that I may endorse it and return it to you.

I hope to see you soon. Drop in on me in Aspen.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bill", with a long horizontal flourish extending to the left.

William M. White, Jr.

WW:jat

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 22,024

FILED AUG 2 1968

METROPOLITAN TELEVISION COMPANY,
SANGRE de CRISTO BROADCASTING CORPORATION,

Nathan J. Paulson
CLERK

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,

Respondents,

NATIONAL ASSOCIATION OF BROADCASTERS,
ALL CHANNEL TELEVISION SOCIETY, et al.,

Intervenors.

On Petition for Review
of Memorandum Opinion and Order of the
Federal Communications Commission

REPLY BRIEF FOR PETITIONERS
METROPOLITAN TELEVISION COMPANY
and SANGRE de CRISTO BROADCASTING CORPORATION

JAMES A. McKENNA, JR.
VERNON L. WILKINSON
ROBERT W. COLL
CARL R. RAMEY

1705 DeSales Street, N.W.
Washington, D. C. 20036

Counsel for Petitioners



(i)

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REPLY BRIEF FOR PETITIONERS
METROPOLITAN TELEVISION COMPANY
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I

THE COMMISSION DID NOT DETERMINE,
BY RULE, THAT EVIDENTIARY HEARINGS
ARE UNNECESSARY ON CATV PROPOSALS
IN THE SMALLER TELEVISION MARKETS

Contrary to the assertions of counsel for the Commission (Comm. Br., pp. 10-14)

and the intervenors (Int. Br., pp. 10-22),¹ the Commission did not decide in its *Second Report and Order*, 6 RR 2d 1717 (1966) or provide in the rules adopted pursuant thereto (74.1105, 74.1107 and 74.1109) that it would not hold evidentiary hearings on CATV proposals in the smaller television markets below the top 100. Rather, the Commission there determined to hold evidentiary hearings on "distant" signal proposals in the top 100 markets, absent waiver (Rule 74.1107). With respect to the smaller markets, acknowledging that "there can be substantial problems"² arising from CATV proposals, it decided "to take such action as may be necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention" (Rule 74.1109).³

Despite Commission counsel's argument (Comm. Br., p. 16) that there is some *substantive difference* (not articulated) between public interest problems arising from CATV proposals within and below the top 100 markets, it was the Commission's view — not just Commissioner Loevinger's⁴ — that the "two situations. . . call for *different procedures*."⁵ *Second Report and Order*, *supra*, para. 145. As the Commission explained in its recent (June 28, 1968) decision in *Midwest Television, Inc. (KFMB-TV)*, 13 RR 2d 698, 712 (not cited or explained by Commission counsel or by intervenors):

"The sole difference is that the burden of proceeding and of proof lies on the CATV system in the case of distant signal proceedings under Section 74.1107(b) and is largely on the petitioning broadcaster in a footnote 69 proceeding arising under Section 74.1107(d) and Section 74.1109. . . ."

¹ The Joint Brief of Intervenors, Vumore Video Corporation of Colorado, Inc. and the City of Colorado Springs, Colorado, will be cited, "Int. Br. ____"; that of intervenor, Pueblo TV Power, Inc., "Pueblo Br. ____."

² *Second Report and Order*, *supra*, para. 145.

³ *Ibid*, para. 146.

⁴ Concurring in part and dissenting in part in *United Transmission, Inc.*, 9 RR 2d 482, 486 (1967). See Comm. Br., p. 16, fn. 12.

⁵ Emphasis supplied throughout unless otherwise specified.

In the case under review, the Commission did not bottom its decision (as counsel for the Commission and intervenor have here done) upon any prior rule making determination. On the contrary, the Commission – continuing to acknowledge its responsibility to deal effectively with CATV problems in the small markets – called petitioners' submissions below "praiseworthy" (R. 768) and of "value" (R. 765), and purported to "set forth. . . [its] most immediate objections *in the hope they will be met in any similar filings in the future*" (R. 765).

Thus, the question before the Court is not whether petitioners' showing below warranted a "waiver" of a Commission rule (Comm. Br., p. 15) – for no Commission rule says that evidentiary hearings will not be held on CATV proposals below the top 100 markets. Nor is it proper to characterize petitioners' request for an evidentiary hearing as one for "additional protection outside the rules" (Comm. Br., p. 15; Int. Br., p. 22) – for the rules specifically contemplate and provide procedures, including evidentiary hearings, as "may be necessary in the public interest" to dispose of petitions presenting "substantial questions" arising from CATV operations in the smaller markets. *Second Report and Order, supra*, para. 146; Rule 74.1109(f).

Opposing counsel are, therefore, in error when they accuse petitioners of seeking a rule change and attempt to tell this Court that the Commission has decided *by rule* not to hold evidentiary hearings in the smaller markets.

At the same time, petitioners are not contending that the Commission must hold hearings on every CATV proposal to which objection is made, nor would the reversal here sought produce any such *ad horrendum* consequences as envisioned by Commission counsel (Br., p. 18). The Commission obviously need not hold, and from the numerous cases cited by intervenor (Int. Br., pp. 20-21) it has not held, hearings on "bare-bone" allegations of economic injury or on insubstantial

objections raising no public interest questions of consequence, *Cedar Rapids Television Co. v. FCC*, ___ U. S. App. D.C. ___, 387 F.2d 228 (1967).

But petitioners insist – in line with the Commission's own pronouncements and rules – that it is bound to "take such action as may be necessary in the public interest" in disposing of petitions bringing to its attention "substantial questions." And petitioners assert, in light of the presentation made below, that the Commission has here arbitrarily and erroneously refused to consider, and properly dispose of, basic public interest questions affecting the future of VHF and UHF television in Colorado Springs-Pueblo and the diversification of mass media.

These contentions are not at odds with the Commission's authority, where appropriate, to dispose of pleadings in "summary" or "expeditious" fashion.⁶ But the desire for administrative convenience and expedition alone cannot justify simply sloughing to one side substantial questions directed to the Commission's basic responsibilities to foster and maintain local broadcasting, promote UHF development and provide for diversification.

To dispose of the various questions arising from its recently asserted jurisdiction over CATV, the Commission must establish standards, tests and requirements which are consistent with the public interest. The Commission has not done so – by rule or otherwise. Neither its decision, nor the opposing briefs, suggest any test or standard by which to judge the propriety of the Commission's action in

⁶ Intervenors' repeated reference to Rule 74.1109 as providing for "summary non-hearing procedures" (Int. Br., pp. 10, 16, 18, 22) apparently stems from the Supreme Court's decision in *U. S. v. Southwestern Cable Co.*, ___ U. S. ___, 13 RR 2d 2045 (1968), and its quotation of that language from the *Second Report*. See 13 RR 2d at 2051. But the only "summary non-hearing" procedure considered by the Supreme Court dealt with the question whether the Commission could, pending the outcome of a previously ordered evidentiary hearing, summarily

this case or in any future case. While we do not quarrel with the right of the Commission to require a substantial showing, here as in other cases,⁷ we do insist that the Commission must spell out its requirements and then apply them rationally and consistently, *West Michigan Telecasters, Inc. v. FCC*, ___ U. S. App. D. C. ___ (No. 21,396), ___ F.2d ___ (1968). The Commission is required "to make clear. . . the burden of proof it expects petitioners seeking an evidentiary hearing to meet." *Cedar Rapids Television Company v. FCC*, *supra*, 387 F.2d at 232.⁸

Petitioners have suggested that the appropriate test is that of *Federal*.⁹ In addition, the public interest consequences here are not dissimilar to those in a *Carroll* case,¹⁰ thus suggesting that standards laid down by this Court in *Carroll* and by the Commission in *KGMO*, *supra*, should suffice. (See Opening Brief, pp. 35-36). Petitioners have met each of these tests but, in the rejection of their efforts, they have not been told either what was lacking or what more is required.

Moreover, the tests of *Federal* and *Carroll* are not inappropriate simply because they concerned "licensing."¹¹ The effect upon the public interest of

⁶ (Continued)

and based upon pleadings alone, direct a CATV system to halt operations at a specified point. Here we have a wholly different matter — whether the Commission could lawfully authorize Vumore's CATV service *without any hearings at all*. Cf. *Southwestern Operating Co. v. FCC*, 122 U. S. App. D. C. 137, 351 F.2d 834 (1965).

⁷ Cf. *KGMO Radio-Television, Inc. v. FCC*, 119 U. S. App. D. C. 1, 336 F.2d 920 (1964); *Southwestern Operating Company v. FCC*, 122 U. S. App. D. C. 137, 351 F.2d 834 (1965).

⁸ As the Court there observed in affirming, "The Commission could reasonably require some evidence of reduced revenues or lost advertising, and of the nature of the CATV operations," — all of which and far more were supplied here.

⁹ *Federal Broadcasting System v. FCC*, 96 U. S. App. D. C. 260, 225 F.2d 560 (1955).

¹⁰ *Carroll Broadcasting Co. v. FCC*, 103 U. S. App. D. C. 346, 258 F.2d 440 (1958).

¹¹ As a matter of fact, "licensing" is, or may be, involved in this case. It will be recalled that, in order to meet its "franchise commitment" (R. 791), Vumore filed a microwave application
(Continued)

CATV proposals – carrying numerous broadcast signals not otherwise available and originating competing services – are obviously identical to those arising from the authorization of new broadcast stations. Indeed, since CATV is not free and since it cannot be made available to all persons, its destructive effects upon the public interest have no immediately apparent compensating public benefits equal to those flowing from the authorization of additional broadcast facilities.

But if the test is neither *Federal* nor *Carroll* – as Commission counsel and intervenors assert – then both the Court and the petitioners are left without any test at all. The petitioners and the Court are asked simply to accede to the unlimited, undefined and unreviewable “discretion” and “expertise” of the agency. Such a result cannot be squared with sound principles of administrative law nor justified on grounds of “expedition” and administrative convenience.

II

UNDER ANY REASONABLE STANDARD, PETITIONERS’ SHOWING REQUIRED AN EVIDENTIARY HEARING AND A THOROUGH EXPLORATION OF THE PUBLIC INTEREST QUESTIONS PRESENTED

In making their presentations below, petitioners adduced facts at the very outset showing that the *specific situation* existing in the Colorado Springs-Pueblo market was significantly different from the *general situation* which the Commission,

¹¹ (Continued)

to carry the Denver signals to Colorado Springs (R. 787-806). In the face of four timely Section 309(d) petitions to deny, it sought dismissal of that application noting only that such would render the petitions moot. Apparently there has been no change in the “franchise commitment” which led to the filing of that application and the Commission has never informed itself as to the future plans of Vumore for such a microwave service. If its proposed operation is sanctioned on the basis of some undefined “non-licensing” standard, Vumore will no doubt renew its request for a microwave license and argue *res adjudicata*.

in adopting the procedural dichotomy of Rules 74.1107 and 74.1109, envisioned would exist in the smaller markets. Thus, in adopting "different procedures" in its *Second Report*, the Commission noted with respect to smaller markets generally: (1) that the independent UHF (or VHF) station is less likely to develop; (2) that the stations in such markets are apt to be three or fewer and network affiliated, thus allowing the non-duplication rules to be more effective than in the case of independent stations; (3) that the potential for the development of Pay-TV is less in the smaller markets; and (4) that these markets may contain "underserved areas where CATV can make its most valuable and traditional contribution" as opposed to the "new revolutionary facet of CATV" and provide "needed service." *Second Report and Order, supra*, paras. 144-6.

The Colorado Springs-Pueblo market presented a quite different situation. Petitioners demonstrated *first*, that, with three VHF stations in operation, any new UHF station would necessarily be independent and, therefore, not protected by the non-duplication rules against the formidable independent competition from the *Chicago Tribune's* KWGN-TV operation in Denver; *second*, that there was a very real likelihood that an independent UHF facility could develop within the next several years absent the importation of outside signals; *third*, that with its resources and past associations with Pay-TV, the CATV entrepreneur Vumore (controlled by RKO General) — seeking franchises that could affect 750,000 people in central Colorado — represented a very definite and realistic frame-work for Pay-TV in one form or another and posed serious problems under diversification policies; and, *fourth*, with this potential and Vumore's ultimate ("Phase II") plans to import independent stations from Los Angeles and San Francisco, with four channels reserved for originations of its own, its 20-channel proposal could hardly be considered "traditional" to the CATV industry.

Thus, the Colorado Springs-Pueblo situation is decidedly at variance with that which the Commission generally expected to find in the smaller markets.

The petitioners, basing their conclusions upon specific factual data, also clearly demonstrated: (1) that despite a theoretical Grade B service, the Denver signals which would be imported are not now in fact viewable in Colorado Springs; (2) that the effect of the introduction of these signals for the first time would be fatal to the development of an independent UHF facility; and (3) that this same importation would adversely affect the ability of the local operating stations to continue to carry significant amounts of local programming which, it was shown, is unusually expensive to produce and is now carried by the stations at substantial loss.

Finally, addressing themselves to the question of "needed service," it was shown that the non-duplication provisions of the rules — applicable, as a practical matter, only to network programming — would not be effective to protect non-network programming from which the existing stations derive a majority of their revenues. But, at the same time, the introduction of this non-network programming from the Denver affiliated stations would not provide any *real* diversity in programming to the public *in the long run* since the Colorado Springs-Pueblo stations own 90% of the same programming but carry it *at different times* than the Denver stations.¹²

¹² The Commission found (R. 767) that it "impeaches" the showing of injury from the importation of non-network programs to point out, at the same time, that such importation would provide no true diversity and Commission counsel (Comm. Br. 24) and intervenors (Int. Br., pp. 29-30) make the same assertion. Such "impeachment" can arise only as the result of fundamental misunderstanding (*cf.* Commissioner Cox's dissent, R. 784). The point is that the non-network programming in Denver and Colorado Springs-Pueblo is carried at *different* times so that the local stations are *not* protected by the non-duplication rules (limited to 24 hours) from "fractionalization" of audience during those non-network hours. But, since the Colorado Springs-Pueblo stations have exhibition rights to 90% of the non-network programming (films, syndication, etc.) which the Denver affiliates use, the Colorado Springs-Pueblo residents, *in the long run*, would see 90% of that non-network programming over their local facilities. Thus, the CATV system would produce audience loss, *each day*, during unprotected non-network hours, by carrying programs 90% of which would in due course be available on the local stations. Accordingly, as the Commission itself recognized, Vumore's proposal will in the long run provide insufficient program diversity to "justify the installation of the CATV system." (R. 764.)

No party below attempted to rebut any of these specific factual allegations.¹³ Rather, Vumore below contented itself with making attacks upon the good faith of a principal of KRDO-TV and Pueblo in its brief here — going beyond the record and into matters never alluded to by the Commission below — chooses to emphasize the fact that a principal of KOAA-TV once owned 2% of a Pueblo franchise applicant which he abandoned when he “had occasion to learn more about the respective roles of free broadcasting and CATV” (Pueblo Br., Appendix D). Thus, the allegations and factual data presented to the Commission below were neither traversed nor answered and they stand in this record effectively unrebutted.

The answers to the presentation now attempted in this Court are: (1) that petitioners failed to establish, because they did not resort to “engineering evidence”, that the Denver stations do not *now* provide off-the-air service to Colorado Springs (this, by Commission counsel only, Comm. Br., pp. 32-34); (2) that the allegations as to the fatal effect of the services upon UHF development and the destruction of local programming now carried by the VHF stations are “somewhat speculative” (Comm. Br., p. 24) and consist of “only speculations, prognoses and forecasts of future economic impacts of an untried service in an untested market.” (Int. Br., pp. 32-33); and (3) that an evidentiary hearing on these and other issues raised — potential for Pay-TV, problems of diversification — “would be administratively unsound and of no practical value.” (Comm. Br., p. 27; Int. Br., pp. 33, 45).

The absence of usable signals from the Denver stations was convincingly and unequivocally established by petitioners: (1) by ARB data showing no significant

¹³ Intervenor, Pueblo TV Power, Inc. (Pueblo Br., p. 5, fn. 1) and certain other intervenors (Int. Br., p. 27, fn. 8) refer this Court to a “rebuttal study” submitted by Pueblo on May 1, 1968. The study is not a part of this record nor was it considered by the Commission decision under review, adopted on April 10, 1968. (R. 759.) It is ironic that Pueblo — which resisted strenuously below efforts by petitioners and others (R. 899-904) to have its proposal consolidated and considered with that of Vumore — now, in effect, asks this Court to consolidate the two proposals by going outside the record and referring to its so-called “rebuttal study.”

viewing of the Denver stations in Colorado Springs; (2) by the fact that all three networks have separate affiliates for each market; (3) by the fact that the City of Colorado Springs conceded that its residents had been restricted to the viewing of the three local television stations; (4) by the fact that Vumore itself sought microwave service to bring the signals to its system; and (5) by the fact that Vumore has unequivocally stated that it does not consider its CATV services "saleable" without the right to furnish the Denver signals (See Opening Brief, pp. 8-9). The assertion of Commission counsel, in the face of this evidence, that "there simply is no record evidence that Grade B signals cannot be received in the market" (Comm. Br., p. 33), overstating the decision below (R. 763), and not joined by any of the intervenors including the City of Colorado Springs, is obviously unfounded. No rule of law required petitioners to prove by "engineering evidence" a fact which had been competently established by other equally reliable evidence and was in effect stipulated by the concessions and admissions of the adverse parties to the proceeding. See *Albertson v. FCC*, 87 U. S. App. D. C. 39, 43, 182 F.2d 397, 401 (1950).

The contentions of Commission counsel and of the intervenors as to the speculative nature of the issues sought and the essential uselessness of an evidentiary hearing in the context of a case such as this one were completely answered by the Commission itself in its June 28, 1968 decision in *Midwest Television, Inc. (KFMB-TV)*, 13 RR 2d 698, which Commission counsel and the intervenors scrupulously avoid either citing or explaining. That case involved precisely (albeit in the nation's 50th market) the same kind of issues which petitioners here raised, i.e., the nature and extent of all CATV activity affecting the market; whether theoretical Grade B signals from Los Angeles were in fact available for viewing off-the-air in San Diego; the effect of carrying such signals via CATV upon VHF network affiliates; the effect of that carriage upon independent UHF stations, one in operation, another not yet in operation; and the potential of these systems for program originations and Pay-TV.

In deciding that the theoretical services were not in fact readily viewable in San Diego¹⁴ and concluding that their carriage by CATV systems generally would adversely affect the development of UHF in that market and for that reason prohibiting their carriage, the Commission had these observations upon the nature of proceedings of this sort, the problems of proof and the value of evidentiary hearings for the disposition of questions such as the Court now has before it in this case. Rejecting the Examiner's notion (13 RR 2d at 708) that the hearing was properly concerned only with "actual stations" in the market, the Commission stated (13 RR 2d at 717):

"... the issues in this proceeding do not require proof of probable success in present circumstances. The major market hearing procedures adopted in the Second Report were not based on an assumption of immediately viable independent UHF stations [footnote omitted] but were intended to effectuate the goals of All-Channel Receiver legislation by preserving an opportunity for existing UHF independents to become successful with the passage of time and for the development of new UHF stations in the future."

Noting contentions made by the CATV system as to the difficult nature of such proof — contentions virtually identical to those now being made by Commission counsel and Vumore — the Commission held (13 RR 2d 711-12):

"... the evidentiary hearing in this and other major market proceedings is not adjudication in the sense that it is concerned with a determination of past and present conduct or liabilities but rather has the object of eliciting sufficient information to permit the Commission to make an informed policy judgment as to the best future course in the market involved. See

¹⁴ In part based upon the fact that the CATV system sought microwave authority to carry the Los Angeles signals and admitted that the CATV service was not saleable without them — this called the "most telling" point. See 13 RR 2d at 723.

American Airlines, Inc. v. Civil Aeronautics Board, 359 F.2d 624, 629-630 (C.A.D.C.), cert. den., 385 U. S. 843.

* * * * *

"The burden of proof in major market hearings on issues having to do with *potential penetration* and *probable effect* on *potential service* cannot be so strict that it is impossible to meet, with the result that the outcome *depends solely on whether the proceeding was instituted pursuant to §74.1107(a) or §74.1109*. The policy matters involved and their importance to the public interest are such that we must make a judgment, in light of the record, as to what present course would best serve the overall interest of the public in the San Diego area. We appreciate the difficulties that a case of this nature presents to a Hearing Examiner and to the parties, intertwined as it is with important and novel matters of policy which depend somewhat on factors not capable of ironclad proof. The hearing process in this case *has served a useful purpose* and, bringing to bear our expertise on the record compiled in that process, we must now make an informed judgment as to substantive policy."

The Court cannot therefore accept the assertion of Commission counsel and intervenors as to the essential uselessness of the evidentiary hearing process in cases of this sort.¹⁵

Keeping in mind that petitioners' entire presentation was made as a threshold showing directed only to the narrow question as to whether they were entitled to be heard, its rejection — under a standard which is yet to be articulated — was wholly arbitrary. As Commissioner Cox observed (R 784-5) of the presentation:

"... this is the most substantial showing ever made in a case of this kind. It meets every test the majority has ever announced. It stands substantially unimpaired despite the majority's uncritical

¹⁵ The values of administrative hearings cannot simply be cynically discounted. See *Harriman Broadcasting Co. v. FCC*, ___ U. S. App. D. C. ___ (No. 21,222), ___ F.2d ___, 13 RR 2d 2073 (1968) affirming a Commission decision denying an application after a hearing held only at the insistence of this Court. *Folkways Broadcasting Co., Inc. v. FCC*, ___ U. S. App. D. C. ___, 375 F.2d 299, 8 RR 2d 2089 (1968).

acceptance of the staff's efforts to undermine it. It is supplemented by substantial arguments in the other pleadings filed by the local stations and by other broadcast interests. If a hearing was ever indicated, it is required here!"
(emphasis by Commissioner Cox)

The confluence of public interest questions coming out of this record is enormous: In Vumore, we start with a combination of two of the most substantial CATV entrepreneurs in the country, entrepreneurs who are apparently in the process of acquiring franchises which could affect 750,000 people in Colorado; Vumore, with intervenor Pueblo, will immediately affect the two core cities of unique importance to the Colorado Springs-Pueblo market; the result of their services will be, from the outset, to pit anyone hopeful of establishing a UHF independent station against the *Chicago Tribune's* KWGN-TV operation in Denver; the result of this increased and unnatural service must be, as well, to adversely affect the existing stations leading them inevitably to curtail or eliminate local services which they have demonstrated, without contradiction, are now being furnished at a substantial loss; the eventual merger of the Denver and Colorado Springs markets — with the networks and national advertisers using the former to reach the latter — is by no means remote; the ultimate potential for an entrepreneur like Vumore with such substantial systems in a small area to purchase and originate significant amounts of programming through a system of Pay-TV (whatever it be called) is realistic; yet, the Commission in the face of all of these problems, authorizes the service without a single finding of public need for it or benefit from it.

As this Court observed most recently in *Mrs. Burton Joseph, et. al., v. FCC*, ___ U. S. App. D. C. ___ (No. 21,873), ___ F.2d ___ (July 30, 1968), Slip Opinion, p. 9:

"When the subject of surveillance is as sensitive as that involved here, when there is *no hearing at which the full facts are brought*

out, promoting confidence that all relevant facts and aspects have been considered and that the public interest would be served by the grant, when the affirmative finding of public interest required by Congress does not appear expressly, when there is no opinion or other statement providing *a reasoned application of articulated standards* to the facts of the case, and when the Commission has at least some concern that under today's conditions the public interest requires a strict approach, there exists a combination of danger signals that cannot be ignored or bypassed."

The "danger signals" here present are numerous and obvious. They have been ignored, for reasons not adequately stated nor otherwise apparent, despite the Commission's promised scrutiny of such problems.

Accordingly, it is respectfully submitted that the Commission's Order authorizing carriage of the Denver signals in Colorado Springs should be set aside and the case remanded for further proceedings adequate to dispose of the public interest questions presented.

Respectfully submitted,

JAMES A. McKENNA, JR.
VERNON L. WILKINSON
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August 5, 1968.

